June 9, 2021

Dear Judge,

I have been a judicial law clerk for the Honorable Troy L. Nunley in the Eastern District of California for almost two years. In that time, I have supervised about 20 externs. Very few of those externs have left a long-lasting impression on me. But Sarah did. During her initial interview, Sarah's work and life experience set her apart from the average law student. I was also impressed with her ambition to pursue competitive opportunities, such as law review, an internship with the Department of Justice in Washington, D.C., and the externship with Judge Nunley. I could tell Sarah was going to be an exceptional extern.

Our practice in Judge Nunley's chambers is to treat externs like "baby clerks." Just like clerks, the externs work on pending civil motions start to finish. An extern is assigned a motion, reads the briefing, researches relevant case law, evaluates the parties' arguments, and writes an order that is ultimately reviewed and signed by the Judge. Our goal is to give externs as much practice as possible writing, researching, and thinking critically about real legal issues before the Court, and to do so from the Court's perspective.

Sarah worked on several motions during her externship, including motions to dismiss, a motion to remand, and a motion to withdraw as counsel. Each motion involved challenging procedural and substantive legal issues. Sarah tackled each project enthusiastically and professionally. She demonstrated excellent research and writing skills and also knew when to ask for help. We had many engaging conversations working as a team to figure out difficult issues. I enjoyed supervising Sarah not only because of the energy and maturity that she brought to her work, but also because of her warm personality, great sense of humor, and thoughtfulness. Any chambers would be lucky to work with Sarah, and I highly recommend her for a clerkship. I would be happy to discuss further if you have any questions.

Sincerely,

Paige Davidson

Paige Davidson
Law Clerk to the Honorable Troy L. Nunley
404-626-3618
pdavidson@caed.uscourts.gov

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

Sarah Gamble has informed me that she applied for a clerkship position in your chambers and therefore requested my letter of recommendation. I am happy to comply with her request because I have had the opportunity to instruct Sarah as her professor in Legal Research and Writing at King Hall Law School at the University of California, Davis.

I have been practicing law for over 40 years, most of that time with the Office of the California Attorney General, and since 2007, teaching here at King Hall. For that reason, I feel well-qualified to assess which attributes a successful young attorney must possess in order to succeed. I wish to commend to you the qualities which I feel will enable Sarah to become an invaluable asset to you: Sarah possesses honesty, integrity, dignity, and humility...qualities that are essential in an attorney. She possesses an incisive mind which I feel further legal training will greatly enhance. Lastly, Sarah possesses motivation and determination...she is one of the most earnest and dedicated students I have ever had the pleasure of teaching. I am especially impressed with her collegiate athletic endeavors.

In my first year class in Legal Research and Writing, Sarah demonstrated her superior research and writing skills earning the Witkin Award. It is not hyperbole to say that Sarah is one of the best researching and writing students I have taught. Her bearing is confident, poised, and articulate. In my opinion there is no doubt that she has both the ability and the character that will enable her to become an accomplished asset to your chambers.

Additionally and significantly, Sarah is a wonderful person. She has a very pleasant and outgoing personality and a very engaging demeanor. Sarah's classmates appreciated her nurturing, helpful presence and willingness to assist struggling students. I am confident your entire staff will greatly enjoy working with Sarah.

For these reasons, it is my pleasure to give Sarah an unqualified recommendation and to support her application for a clerkship position in your chambers.

Very truly yours,

Clayton S. Tanaka
Professor of Law
Director of Legal Research and Writing
King Hall School of Law
Davis, CA 95616
(530) 754-9806

UNIVERSITY OF CALIFORNIA, DAVIS

BERKELEY • DAVIS • IRVINE • LOS ANGELES • MERCED • RIVERSIDE • SAN DIEGO • SAN FRANCISCO SANTA BARBARA • SANTA CRUZ

SCHOOL OF LAW

400 MRAK HALL DRIVE
DAVIS, CALIFORNIA 95616-5201

May 6, 2021

RE: Sarah Gamble

Dear Judge:

I write to recommend Sarah Gamble for a clerkship in your chambers following her graduation in 2022. Sarah is a remarkable person. She is an excellent student, both hardworking and thoughtful. She is deeply committed to making the world a better place and strongly interested in international human rights work. And she is a delightful person. Sarah would make an outstanding law clerk, and I give her my highest recommendation.

Sarah was a student in my Contracts class during the fall 2019 semester and again in my International Litigation and Arbitration class during the fall 2020 semester. It took Sarah a little while to adjust to law school classes. During her first semester, she won the Witkin Award in her legal writing class. But otherwise, the A- that she earned in my Contracts class was her highest grade. During the spring semester of her first year, all classes were graded pass/fail because of covid. In the first semester of her second year, however, Sarah earned three straight As and an A+. I might add that this was under very adverse circumstances—not just the remote learning that all our students had to endure but the fact that she and her family were forced from their home in Sonoma County for several weeks by wildfires (though thankfully their home was saved).

One of the As Sarah earned during the fall 2020 semester was in my International Litigation course, which is an advanced civil procedure class focusing some issues the students have encountered before like personal jurisdiction and forum non conveniens, and others that they have never seen like the extraterritorial application of federal statutes, the Foreign Sovereign Immunities Act, and the enforcement of foreign judgments. Sarah's performance was outstanding. Her exam answers demonstrated the ability to sort through difficult issues, to pull those issues together, and to express herself clearly and concisely. In class discussions, her comments were always thoughtful, and she often noted points about the cases that others had missed.

Sarah is a member of the *UC Davis Law Review* and currently serves as a Senior Articles Editor. This is one of the most demanding jobs on the law review, involving both the selection of

articles and their editing for publication. The fact that Sarah sought out this role demonstrates her dedication and her willingness to work hard, as well as the esteem that others on the law review have for her and her abilities.

But Sarah's real passion is human rights. For two years between college and law school, she worked at the company Clif Bar on human rights issues in its supply chain. This experience has given rise to a lasting commitment. For her second law-school summer, Sarah had plenty of chances to interview with big firms and undoubtedly would have landed a position as a summer associate at one of them. She chose instead to pursue public interest jobs. She was offered positions with the ACLU of Northern California and the Center for Justice and Accountability. She chose CJA because of its focus on international human rights. I told her that these jobs were unlikely to lead to offers of permanent employment, but she was willing to march to her own drummer and take a position that she was truly passionate about.

On a personal level, Sarah is delightful. Maybe the best words I can use are "genuine" and "kind." She is soft-spoken but not shy. I know she served as Captain of the Pomona-Pitzer varsity volleyball team in college, and I can imagine her as someone who led by example. She also has a wry smile and sense of humor. Sarah seems to be very well liked by her classmates at King Hall and her colleagues on the law review. She would fit very well into any chambers.

There are many impressive students at UC Davis, but Sarah is one of the very best. She is an excellent student with outstanding analytical and writing skills. She is hardworking and strongly committed to pursuing the things she believes in. And she is a thoughtful and kind person, with a sense of humor, who works well with others. If I were hiring a law clerk, I would hire Sarah.

If you have any questions, or if I can be of further assistance, please don't hesitate to email me at wsdodge@ucdavis.edu or to call me on my cell (510-421-0494).

Sincerely,

William S. Dodge
Martin Luther King, Jr. Professor of Law
John D. Ayer Chair in Business Law

SARAH GAMBLE

400 Mrak Hall Drive, Davis, CA 95616 ▪ 707.287.8445 ▪ swgamble@ucdavis.edu

WRITING SAMPLE

The following writing sample is a judicial order I wrote regarding a motion to dismiss. The supervising clerks granted full permission to use the redacted sample in its current form. Specifically, all names have been changed to protect the confidentiality of the parties.

The case was brought by the daughter of an inmate who was murdered by his cellmate. The daughter alleged federal constitutional rights under 42 U.S.C. § 1983 and a state law claim under the California Public Records Act.

A law clerk reviewed the order and made some stylistic recommendations. A few of her suggested edits were incorporated in the writing sample.

I. ANALYSIS

A. Claim One: Failure to Protect a Prisoner (42 U.S.C. § 1983)

Defendants move to dismiss Plaintiff's First Cause of Action on the basis that Plaintiff is not the successor-in-interest to Decedent's Eighth Amendment claim and therefore does not have sufficient standing to bring the claim on behalf of Decedent under 42 U.S.C. § 1983 ("§ 1983"). (ECF No. 19 at 5.) The federally protected rights enforceable under § 1983 are personal to the injured party. *Rose v. City of Los Angeles*, 814 F. Supp. 878, 881 (C.D. Cal. 1993). However, under 42 U.S.C. § 1988, a § 1983 claim, which arose before death survives the decedent when state law authorizes a survival action. 42 U.S.C. § 1988; *see Robertson v. Wegmann*, 436 U.S. 584, 589–90 (1978); *Tatum v. City & Cnty. of S.F.*, 441 F.3d 1090, 1093 n.2 (9th Cir. 2006). Under the California Code of Civil Procedure, a survival action may be brought either by the decedent's personal representative or, if there is no representative, by the decedent's successor-in-interest. Cal. Civ. Proc. Code § 377.30. Here, Plaintiff alleges she has the superior right to bring the lawsuit "as an individual and as a successor-in-interest." (ECF No. 15 at 2.)

Defendants argue Plaintiff does not have a superior right to bring this claim on behalf of Decedent because pursuant to California law, Decedent's spouse, rather than Plaintiff, is the successor-in-interest to Decedent's § 1983 claim. (ECF No. 19 at 6.) In opposition, Plaintiff argues there is no proof Decedent was married at the time of his death and regardless, as Decedent's biological daughter, Plaintiff has the legal right to half of Decedent's separate property, giving her standing for a survivorship claim. (ECF No. 20 at 10.) In reply, Defendants point to Plaintiff's declaration attached to the FAC that lists Nicole Brown as "the wife of Decedent." (ECF No. 22 at 3.) This Court agrees with Defendants and finds the facts alleged in the FAC do not leave this matter reasonably open to dispute.[1]

Defendants additionally argue in their reply that Plaintiff's legal right to Decedent's separate property is irrelevant to this case, because separate property does not include Decedent's § 1983 action. (ECF No. 22 at 4.) Defendants' assertion is correct. In California, a successor-in-

[1] The Court also takes judicial notice of Decedent's death certificate filed with Amador County that lists Nicole Brown as Decedent's surviving spouse. (ECF No. 15 at 17.)

interest only has the authority to act with respect to the particular causes of action to which she succeeds. Cal. Civ. Proc. Code § 377.30; *see Exarhos v. Exarhos*, 159 Cal. App. 4th 898, 908–09 (2008). As Decedent's daughter, Plaintiff is a successor-in-interest to Decedent's separate property. Cal. Prob. Code § 6401(2). However, Defendants argue — and Plaintiff does not refute — the instant personal injury action is community property. (ECF No. 22 at 3.) And, under California Probate Code § 6401, Decedent's surviving spouse, rather than Plaintiff, is the sole beneficiary of Decedent's community property. *See* Cal. Prob. Code § 6401.

Therefore, because Plaintiff may only bring a claim with respect to the action she succeeds and she is not a successor-in-interest to Decedent's community property, Plaintiff does not have standing to bring this § 1983 cause of action on behalf of Decedent. Moreover, amendment of this claim is futile. *Lopez*, 203 F.3d at 1130. Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to the First Cause of Action without leave to amend.

B. Claim Two: Interference with Parent/Child Relationship

Defendants next move to dismiss Plaintiff's Second Cause of Action brought under the Fourteenth Amendment's Due Process Clause for Interference with a Parent-Child Relationship. (ECF No. 19 at 9.) Defendants argue: (1) Plaintiff fails to allege she and her father "had the type of close and enduring relationship that is protected by the Fourteenth Amendment;" and (2) Plaintiff's Fourteenth Amendment claim fails because it requires an underlying constitutional violation and she has not successfully alleged an Eighth Amendment violation. (*Id.*) The Court will address each of these arguments in turn.

i. Protected Familial Relationship

Defendants argue Plaintiff's Second Cause of Action should be dismissed for failure to allege that she and Decedent had the type of close and enduring relationship protected by the Fourteenth Amendment Due Process Clause. (ECF No. 19 at 9.) Plaintiff opposes, arguing a biological relationship is "minimally sufficient" for a due process claim. (ECF No. 20 at 4.) Plaintiff's assertion goes against both Supreme Court and Ninth Circuit precedent.

While the Ninth Circuit has recognized that the Fourteenth Amendment protects a child's liberty interest in the "companionship and society" of her father, *see Hayes v. Cty. of San Diego*,

736 F.3d 1223, 1229–30 (9th Cir. 2013), the Ninth Circuit has also explicitly stated "the mere existence of a biological link does not merit equivalent constitutional bonds." *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1058 (9th Cir. 2018) (*quoting Lehr v. Robertson*, 463 U.S. 248, 262 (1983)). Instead, "[j]udicially enforceable Fourteenth Amendment interests require enduring relationships reflecting an assumption of parental responsibility." *Wheeler*, 894 F.3d at 1058 (noting the plaintiff in *Wheeler* did not allege his mother "raised him, otherwise resumed responsibility for his upbringing, or even maintained consistent contact with him during his childhood"). Therefore, Plaintiff's first argument that her biological relationship is sufficient to bring this claim is unavailing.

However, Plaintiff further argues because "Plaintiff and Decedent's relationship was constant throughout both of their lives," she has pleaded sufficient facts to assert a claim for interference with the parent/child relationship. (ECF No. 20 at 4.) In *Lehr v. Robertson*, the Supreme Court found that a father who "grasps the opportunity to develop a relationship with his offspring … and accepts some measure of responsibility for the child's future . . . may enjoy the blessings of the parent-child relationship." 463 U.S. 248, 262 (1983). Here, Plaintiff alleges "[w]hile Decedent was living, he assumed responsibilities for Plaintiff's upbringing and maintained consistent contact with Plaintiff both during childhood and adulthood of Plaintiff." (ECF No. 15 at 4.) Therefore, while a biological relationship is not "minimally sufficient" to establish the requisite relationship, Plaintiff has stated sufficient facts at the pleading stage to demonstrate her relationship with Decedent was plausibly protected under the Fourteenth Amendment Due Process Clause.

ii. Eighth Amendment Violation

In evaluating a claim for interference with familial relations, the alleged violations of Decedent's rights provide the basis for the substantive due process claim. *Cooper v. Brown*, 2019 WL 4138682, at *6 (E.D. Cal. 2019). Having dismissed Plaintiff's First Cause of Action due to lack of standing, in order to rule on the Second Cause of Action, the Court must determine whether Plaintiff sufficiently alleges an underlying violation of Decedent's Eighth Amendment rights. Plaintiff asserts Officer Defendants and Lizarraga knew McCoy posed a "substantial risk

of harm" to Decedent and "were deliberately indifferent to that risk." (ECF No. 15 at 9.) In their Motion to Dismiss, Defendants argue Plaintiff "does not plausibly allege that each Defendant was actually aware that Mr. Smith was in 'substantial danger.'" (ECF No. 19 at 8.) In opposition, Plaintiff argues she need only "allege that a defendant was 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that the defendant] must also have drawn and disregarded that inference." (ECF No. 20. at 7.) In response, Defendants claim Plaintiff's allegations are "predicated on acts of negligence" and consequently do not support her deliberate indifference claim. (ECF No. 22 at 4.)

Prison officials have a duty to protect prisoners from violence at the hands of other inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). The failure to protect an inmate may rise to the level of an Eighth Amendment violation when: (1) the deprivation alleged is objectively, sufficiently serious; and (2) the prison official is deliberately indifferent to the inmate's health or safety. *Id.* at 834. "Deliberate indifference describes a state of mind more blameworthy than negligence" but is fulfilled by something "less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* at 835.

a) Sufficiently Serious

Under a failure to protect claim, the sufficiently serious deprivation prong may be satisfied by allegations showing Decedent was incarcerated under conditions posing a substantial risk of serious harm. *See Lemire v. California Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1075 (9th Cir. 2013). Here, Plaintiff alleges "[a]fter Decedent and Mr. Martin were assigned to the same cell . . . Mr. Martin acted increasingly impulsive and unpredictable towards Decedent, and threatened Decedent's safety." (ECF No. 15 at 5.) This led to Decedent's alleged reports of "Mr. Martin's threatening and hostile behavior to prison staff" and request for "a new cell mate." (*Id.*) Plaintiff further alleges Martin brought a rock over six inches in diameter from the recreation yard into his shared cell with Decedent, which he used to murder Decedent. (*Id.* at 6.) These allegations sufficiently establish Decedent was incarcerated under conditions posing a substantial risk of serious harm.

b) Deliberate Indifference

The closer question is whether Plaintiff established the subjective element of a deliberate indifference claim. Defendants argue "[a]ssuming, without conceding that Mr. Martin posed a substantial risk of harm to Mr. Smith, Plaintiff nevertheless fails to allege facts supporting the subjective deliberate indifference prong," because the "FAC does not plausibly allege that each Defendant was actually aware that Mr. Smith was in 'substantial danger.'" (ECF No. 19 at 7–8.) Plaintiff opposes, arguing "a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." (ECF No. 20 at 7 (citing *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016)).)

This subjective inquiry involves two components. First, Plaintiff must "demonstrate that the risk was obvious or provide other circumstantial or direct evidence that the prison officials were aware of the substantial risk" to Decedent's safety. *Lemire*, 726 F.3d at 1078. Second, Plaintiff must show there was no reasonable justification for exposing Decedent to the risk. *See id.*; *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). Plaintiff attempts to establish this subjective inquiry based on three different factual circumstances.

First, Plaintiff alleges Officer Defendants and Lipman "knew and were aware that Decedent and Eli Martin were having compatibility issues in their shared cell which would lead to violence and great bodily injury." (ECF No. 15 at 4.) More specifically, Plaintiff alleges Decedent's repeated reports about his cellmate's "threatening and hostile behavior" and his request for a new cellmate were ignored. (*Id.* at 5.) Significantly, Plaintiff does not explicitly state Officer Defendants and Lipman ignored Decedent, instead Plaintiff's alleges "Conn Valley prison officers, guards, agents, and employees repeatedly ignored Decedent's request for a transfer." (ECF No. 15 at 5.) Plaintiff additionally alleges Martin "has a known history of violence towards fellow inmates, correctional officers, and other prison staff" and specifically asserts Officer Defendants and Lipman "knew of Mr. Martin's . . . gruesome and violent history." (ECF No. 15 at 4.) However, Defendants argue without more, Plaintiff "fails to allege any facts showing Defendants had specific knowledge of Mr. Smith's alleged complaints about Mr.

Martin." (ECF No. 19 at 8.)

The Court agrees with Defendants. "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). Here, any inference that Officer Defendants and Lipman were exposed to information about Martin's violent history would be drawn from conclusions rather than factual allegations, which is insufficient. *See Twombly*, 550 U.S. at 555 (noting a "pleading is insufficient if it offers mere 'labels and conclusions'"). Plaintiff provides no factual allegations detailing how each Officer Defendant and Lipman knew of Martin's violent history or how they knew about Decedent's complaints. Finally, Plaintiff fails to show how the risk of housing Martin with Decedent was obvious. Therefore, deliberate indifference cannot be established against Officer Defendants and Lipman on these allegations.

Second, Plaintiff alleges Lipman and Officers Collins, Sampson, Stockton, Hillman, Henry, Grant and Crawford were deliberately indifferent to Decedent's safety as they "had a duty to prevent Mr. Martin from having any weapons that would cause great bodily injury or death to others," but "allowed Mr. Martin to bring the rock into the shared cell." (ECF No. 15 at 6.) However, "deliberate indifference describes a state of mind more blameworthy than negligence." *See Farmer*, 511 U.S. at 835. Neither negligence nor gross negligence constitutes deliberate indifference. *Id.* at 835–836. Instead, Eighth Amendment liability rests on Defendants' actual awareness of the risk. *Taylor v. Barkes*, 575 U.S. 822 (2015). In order to state a plausible claim for relief, Plaintiff's complaint must include enough "factual content that allows the court to draw the reasonable inference," *Iqbal*, 555 U.S. at 678, that Lipman and Officers Collins, Sampson, Stockton, Hillman, Henry, Grant and Crawford were aware Martin had taken the rock back to his cell, and then failed to take reasonable action. *See, e.g., Sisneros v. Krittman*, 2016 WL 11447608, at *3 (S.D.Cal., 2016). Without such allegations, Plaintiff fails to assert a deliberate indifference claim against Lipman and Officers Collins, Sampson, Stockton, Hillman, Henry, Grant and Crawford.

Finally, Plaintiff claims Officers Laver and Gordon failed to conduct adequate safety inspections in the cell block where Decedent was killed. (ECF No. 15 at 5.) Plaintiff further alleges Laver and Gordon "knew that Decedent would be attacked" and they "had the means and opportunity to prevent the attack from occurring or continuing, but deliberately failed to do so and were deliberately and wantonly indifferent to the Decedent's safety." (*Id.*) However, the FAC is once again devoid of any factual allegations that support these contentions. Instead, Plaintiff provides bare legal conclusions, which are insufficient to state a claim. *Twombly*, 550 U.S. at 555. Not only are there no facts to indicate Laver and Gordon were aware of the risk, but there are also no facts to indicate the risk was obvious. For example, nothing in the FAC indicates any noise or commotion occurred that may have alerted Laver or Gordon to the struggle. Therefore, this Court finds Plaintiff fails to allege sufficient facts showing Laver and Gordon were deliberately indifferent.

Having failed to allege sufficient facts to demonstrate the risk was obvious or that Officer Defendants and Lipman were aware of the substantial risk to Decedent's safety, Plaintiff fails to establish an underlying constitutional violation. As Plaintiff's Fourteenth Amendment claim is predicated upon an Eighth Amendment violation, failing to allege Officer Defendants and Lipman violated the Eighth Amendment precludes Plaintiff from seeking recovery for an interference with a familial relationship claim. *See Cooper* WL 4138682, at *6. Because the defects described above could be cured by amendment, such dismissal is with leave to amend. *Lopez*, 203 F.3d at 1130. Accordingly, the Court GRANTS Defendants' Motion to Dismiss as to Claim Two with leave to amend.

C. Claim Three: Violation of California's Public Records Act

Plaintiff alleges Adams' failure to make requested documents available for inspection violates her rights under the CPRA. Plaintiff seeks reasonable costs of this suit, attorney's fees, equitable relief, and any further relief this Court may deem appropriate under the CPRA. (ECF No. 15 at 13.) Defendants argue this claim should be dismissed because: (1) the Eleventh Amendment prohibits the Court from enforcing California law against the State of California or its officials; and (2) Plaintiff erroneously names Adams in his individual rather than official

capacity. (ECF No. 19 at 11.) The Court will address Defendants' arguments in turn.

i. Eleventh Amendment

In opposition to Defendants' Motion to Dismiss, Plaintiff argues while the Eleventh Amendment bars suits brought by private citizens against state governments without consent, "there is a clear difference between a suit against state governments and its officers sued in their official capacity and a suit against state officers in their individual capacity." (ECF No. 20 at 11.)

In *Pennhurst State School & Hospital v. Halderman (Pennhurst)*, 465 U.S. 89 (1984), the Supreme Court held the Eleventh Amendment "bars suits in federal court, for both retrospective and prospective relief, brought against state officials acting in their official capacities alleging a violation of state law." However, the Supreme Court "distinguished the situation where a plaintiff brings suit against a state official acting in his individual capacity." *Pena v. Gardner*, 976 F.2d 469, 474 (9th Cir. 1992), *as amended* (Oct. 9, 1992).

In light of this distinction, the Ninth Circuit interpreted *Pennhurst* to mean "the eleventh amendment does not bar a suit seeking damages against a state official personally." *Id.* at 473; *see also Papasan v. Allain*, 478 U.S. 265, 278 n.11 (1986) (noting "[w]hen a state official is sued and held liable in his individual capacity, however, even damages may be awarded."). However, the CPRA does not provide damages as a form of relief. Cal. Gov. Code § 6258; *see Hammerlord v. Filner*, 2013 WL 4046676, at *6 (S.D. Cal. 2013). Therefore, to the extent she seeks to recover damages under the CPRA, Plaintiff's claim fails.

Defendants argue injunctive relief is also prohibited against state officials sued in their individual capacity under § 1983. (ECF No. 19 at 11.) However, Plaintiff has not brought a § 1983 claim against Adams. Instead, Plaintiff seeks relief under the CPRA, which specifically allows any person to "institute proceedings for injunctive or declarative relief." Cal. Gov't Code § 6258. Therefore, the question remains whether Plaintiff can seek injunctive relief in a federal action against state officials sued in their individual capacity under state law.

ii. Individual or Official Capacity

In *Pennhurst*, the Supreme Court found that while prospective injunctions preventing violation of federal law were not barred by the Eleventh Amendment, similar injunctions seeking

compliance with state law were barred when the state was "a real, substantial party in interest." *Pennhurst*, 465 U.S. at 101; *see also Stephens v. Am. Home Assurance Co.*, 811 F. Supp. 937, 961 (S.D.N.Y. 1993). A state is "a real, substantial party in interest" when the judgement sought would require the state to pay monies or be compelled to act or restrained from acting. *Pennhurst*, 465 U.S. at 101–02 n.11.

Plaintiff attempts to circumvent the rule stated in *Pennhurst* by seeking equitable relief against Adams in his individual capacity. However, as the Supreme Court has ruled, "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Similarly, in his concurring opinion to *Pena v. Gardner*, Judge Nelson argued simply glancing at the caption of the case is not "all that is required." 976 F.2d 469, 474 (9th Cir. 1992), *as amended* (Oct. 9, 1992) (Nelson, T.G., concurring). Instead, "courts must still analyze the specifics of the conduct involved when determining whether a suit is against an official in his or her 'official' or 'individual' capacity." *Id.*

According to Judge Nelson, "[a]n official is being sued in his individual capacity if his action was beyond the scope of his designated power." *Id.* Here, Plaintiff argues Adams acted outside his official duties by "refusing to produce responsive documents to Plaintiff's CPRA request when the law required him to provide such documents." (ECF No. 20 at 11.) However, a state official who makes an error is not necessarily acting outside the scope of his designated power. In *Pennhurst*, the Supreme Court noted the critical factor was "whether the defendant state official was empowered to do what he did, i.e., whether, even if he acted erroneously, it was action within the scope of his authority." *Pennhurst*, 465 U.S. at 112 n.22.

Here, as the Public Records Act Coordinator at CVSP, Plaintiff asserts Adams "was employed as the Public Records Act Coordinator at Conn Valley State Prison" (ECF No. 6) and had "a legal obligation to make all public records available for inspection by any member of the public upon request" (ECF No. 51). Under the CPRA, Adams, as Public Records Act Coordinator, did not have to disclose the requested information if the "disclosure would endanger the successful completion of the investigation or a related investigation." Cal. Gov't Code §

6254(f). Therefore, even if there was no criminal case pending, as Plaintiff alleges, and Austin erroneously withheld the requested documents, refusing the documents on the basis of an ongoing investigation was within the scope of his designated authority.

Based on the above and the facts alleged in the Complaint, the Court finds Adams was acting within his official rather than individual capacity. The Eleventh Amendment therefore applies and bars Plaintiff's claim.[2] Accordingly, this Court GRANTS Defendants' Motion to Dismiss as to Claim Three. Because this deficiency cannot be cured through the amendment of additional facts, dismissal is without leave to amend. *Lopez*, 203 F.3d at 1130.

[2] The Court declines to address whether Plaintiff may still seek injunctive relief against Adams in a state court action as that issue is not before this Court and is inapplicable to the instant action.

Applicant Details

First Name	**Nicholas**
Middle Initial	**I**
Last Name	**Garifo**
Citizenship Status	**U. S. Citizen**
Email Address	**nickgarifo@virginia.edu**
Address	**Address** Street **3118 Burgundy Road** City **Alexandria** State/Territory **Virginia** Zip **22303** Country **United States**
Contact Phone Number	**7039731012**

Applicant Education

BA/BS From	**James Madison University**
Date of BA/BS	**May 2013**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 11, 2018**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Virginia Tax Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Spring semester law clerk for The Honorable Richard Moore of the Charlottesville Circuit Court,** **Environmental and Regulatory Law Clinic,** **Law and Business program,** **Rivanna Investments,** **Virginia Environmental Law Forum.**

Recommenders

Hayashi, Andrew
ahayashi@law.virginia.edu
(434) 243-9125

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nicholas I. Garifo

3118 Burgundy Road • Alexandria, VA 22303 • (703) 973-1012 • Garifonick@gmail.com

August 25, 2020

The Honorable Elizabeth Hanes
U.S. District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a practicing attorney in Washington, D.C. and a graduate of the University of Virginia School of Law applying for the 2021-2023 law clerk position. I am particularly interested in the position because of my interest in litigation and justice. I can support your chambers because of my professional experiences and expertise.

My prior legal experiences have given me the knowledge and abilities to successfully serve and support your chambers. I am currently an associate attorney at an Am Law 100 firm in Washington, DC where I practice general corporate and securities law. I have represented venture capital firms and private companies in venture capital financings by drafting transaction, restructuring and governance documents. By doing so, I have developed an understanding of both the legal and businesses needs of my clients and how those needs change depending on the risk tolerance and lifecycle of the company. Additionally, I have drafted and negotiated purchase and sale agreements and conducted extensive due diligence for mergers and acquisitions. Also, I have represented issuers, underwriters and agents in public and private offerings of debt and equity securities.

Previously, I clerked for the Honorable Judge Richard Moore of the Charlottesville Circuit Court where I researched civil law, wrote memorandums on a diverse set of issues, gained exposure to trial advocacy, and evaluated records, exhibits, and briefs. Also, as a summer associate at Latham & Watkins LLP I reviewed twenty years' worth of background material to produce multiple sections of an amicus curiae brief. As an intern at the Commodity Futures Trading Commission I reviewed complex business contracts, submitted memorandums on diverse research projects relating to derivatives and swaps litigation, as well as contributed to complaints, motions, and proposed orders used by the trial attorneys. My legal experiences have instilled in me a highly detailed approach to my practice of law and strong organizational, analytical, and time management skills that will help me support your needs.

I have attached my resume, legal transcript and writing sample. Thank you for your time in evaluating my qualifications.

Sincerely,

Nicholas I. Garifo

Nicholas I. Garifo

3118 Burgundy Road, Alexandria, VA 22303 • (703) 973-1012 • Garifonick@gmail.com

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., May 2018
- Activities: Law and Business Program; Virginia Tax Review; Environmental Regulatory Legal Clinic

James Madison University, Harrisonburg, VA
B.B.A., Finance (Minor: Economics), May 2013

BAR ADMISSIONS

- Virginia State Bar and District of Columbia Bar

EXPERIENCE

Nelson Mullins Riley & Scarborough LLP, Washington, DC
Associate – Corporate & Securities Group, September 2018 – Present
- Represented venture capital firms and private companies in venture capital financings by drafting transaction, restructuring and governance documents
- Counseled various private companies going public on NYSE and Nasdaq
- Represented issuers, underwriters and agents in public and private offerings of debt and equity securities
- Prepared and reviewed various federal filings, including annual reports, quarterly reports, current reports, and proxy and information statements, with the SEC, NYSE and Nasdaq
- Counseled clients on entity formation and related corporate governance matters by drafting bylaws, articles of incorporation, stock purchase and incentive plans, and board and shareholder consents
- Prepared applications for chartered de novo banks
- Conducted due diligence for various transactions and prepared summaries of blue sky exemptions
- Drafted client alerts and internal and external memorandums regarding various federal laws and rules
- Negotiated employment agreements and term sheets for corporate entities and managers

Latham & Watkins LLP, Washington, DC
Summer Associate, May 2017 – July 2017 (permanent offer extended)
- Conducted due diligence on target acquisition and helped draft related diligence memorandum
- Reviewed credit agreement amendments and revised master agreements to reflect changes
- Analyzed underwriting agreements to record foreign provisions used in international debt offerings
- Drafted rollover agreements and bringdown certificates for merger and assisted with transaction closing
- Updated template governance documents for use in forming new investment funds
- Analyzed state healthcare regulatory licenses and drafted related change of ownership matrix

U.S. Commodity Futures Trading Commission, Washington, DC
Summer Intern, Enforcement Division, May 2016 – July 2016
- Drafted memoranda analyzing fraudulent sales of securities trading software and application of summary judgement in federal court
- Synthesized data with staff economists and accountants to show market manipulation

American Institutes for Research, Washington, DC
Financial Analyst, April 2015 – March 2016
- Prepared monthly financial reports and collaborated with project leads to ensure accurate projections

Grant Thornton LLP, Alexandria, VA
Financial Management Consultant, September 2013 – April 2015
- Provided financial consulting services to federal and state agencies, including examination of federal loan cancellation framework and loan assumption applications, review of historical financial statements, and broad project management with forecasting of multiple work stream deliverables

Nicholas Garifo
American University, Washington College of Law
Cumulative GPA: 3.76

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Rhetoric	Sara Creighton	A	2	
Torts	Andrew Popper	A-	4	
Contracts	Andrew Pike	A	4	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Angela Davis	A	3	
Legal Rhetoric	Sara Creighton	A	2	
Civil Procedure	Nancy Polikoff	A	4	

Summer 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Professional	Jonathan Lawlor	B	2	
Trusts & Estates	Moretz Edmisten	B+	4	

Nicholas Garifo
University of Virginia School of Law
Cumulative GPA: 3.27

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations (Law & Business)	Quinn Curtis	A-	4	
Start-Up Medtech Company	Weaver Gaines	B	1	
Globalization/Private Dispute Resolution	Tim McEvoy	B	1	
Bankruptcy (Law & Business)	Richard Hynes	B+	3	
Emerging Growth/Venture Capital Companies	Mike Lincoln	B+	2	
Antitrust Review of Mergers	Larry Fullerton	B	3	

This is my first semester at the University of Virginia School of Law after transferring from American University Washington College of Law.

January 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Baseball Law	John Setear	A-	1	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Property	Michael Doran	B	4	
Management of Big Law	Art Robinson	A-	1	
Federal Income Tax	Andrew Hayashi	B+	4	
Constitutional Law	Micah Schwartzman	B	4	
Investment & Valuation in Financial Markets	Richard Evans	B+	1	
Nonprofit Organizations	Kevin Kordana	B+	3	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Securities Regulation	Andrew N. Vollmer	B+	3	
Energy Business	Thomas R. Denison	B+	1	
Independent Research	Andrew Hayashi	A	1	I wrote a position paper on the 2009 protocol to the United States and Switzerland Tax Treaty
Corporate Tax	George K. Yin	B	4	
Modern Real Estate	Alex M. Johnson	B+	3	
Topics in International Tax	Ruth Mason	B+	4	

January 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law Simulation	Kim Ferzan	B	1	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Environmental and Regulatory Law Clinic	Cale Jaffe	B+	6	
Federal Litigation Practice	Ben Rottenborn	A-	3	

September 08, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

RE: Clerkship Recommendation for Nicholas Garifo

Dear Judge Hanes:

I am very pleased to write in support of Nicholas Garifo as he applies to you for a clerkship. Nick was a student in my Federal Income Tax course during the second semester of his 2L year and I supervised his independent research on U.S. income tax treaties.

Federal Income Tax is regarded by many students at UVA as one of the more difficult courses we offer, because it demands the parsing of a notoriously difficult statute, numeracy, and the ability to analyze the regulatory and statutory language against the backdrop of policy issues and common law doctrines. Nick received a B+ grade in the course and was unfailingly well-prepared. I also supervised Nick's research into the proposed protocol to the income tax treaty between the U.S. and Switzerland. He was diligent and conscientious in pursuing this research and did a very good job with a difficult topic. He showed himself to be thoughtful, reliable, and intellectually curious, and his work product was excellent.

In terms of his academic performance more generally, Nick earned solid grades throughout his first year at UVA Law. Nick transferred to UVA from American University's Washington College of Law, where he was a part-time student who earned a 3.76 GPA and an invitation to join Law Review while working full time during the day and taking classes in the evening.

I would also like to highlight for you his work experience. I believe that his background in finance, at Grant Thornton and the American Institute for Research, will make him an asset to your chambers and equip him to understand some of the more complex financial and other business transactions that might appear on your docket.

On a personal note, Nick is thoughtful and a pleasure to talk to. I think his maturity is readily apparent and I hope you will give him strong consideration. If you have any questions, please feel free to contact me.

Sincerely,

Professor Andrew Hayashi
University of Virginia School of Law
580 Massie Road
Charlottesville VA 22903
ahayashi@virginia.edu
(434) 243-9125

Nicholas I. Garifo
3118 Burgundy Road, Alexandria, VA 22303 • (703) 973-1012 • Garifonick@gmail.com

Writing Samples

The enclosed are excerpts from a paper I wrote in my first-year Legal Rhetoric: Research and Writing class. I represented the Government and was responsible for addressing two issues pertaining to a defendant's Fifth Amendment rights. The first issue was whether the defendant was under custodial interrogation when the officers questioned him. The second issue was whether the public safety exception to the Fifth Amendment's Miranda requirement applied to the officers' questioning.

In addition to the enclosed excerpts, please find links below to professional articles I have drafted while working at Nelson Mullins Riley & Scarborough LLP:

- https://www.nelsonmullins.com/idea_exchange/alerts/securities_alert/all/sec-announces-proposal-of-new-framework-for-fund-valuation
- https://www.nelsonmullins.com/idea_exchange/alerts/securities_alert/all/sec-guidance-and-relief-during-covid-19-pandemic
- https://www.nelsonmullins.com/idea_exchange/alerts/securities_alert/all/sec-approves-proposed-amendments-to-regulation-s-k

I. The trial court properly admitted Bannon's confession because he did not confess during a custodial interrogation and his confession was a response to permitted questioning under the public safety exception.

The Fifth Amendment to the United States Constitution protects criminal defendants from being compelled to testify against themselves. See U.S. Const. amend. V. A defendant's statements are inadmissible if the statements were obtained during a custodial interrogation without prior notification of constitutional rights. See Miranda v. Arizona, 384 U.S. 436, 477-79 (1966) (creating the Miranda rights). Miranda rights only apply to people under custodial interrogation; and to determine that an individual is under custodial interrogation, the individual must go through an interrogation while in custody. Id. Both parties agree that Bannon confessed to selling MDMA during an interrogation. In determining whether someone is in custody, the ultimate inquiry is whether there was a formal arrest or restraint of the degree associated with a formal arrest. Id. at 478. Bannon did not undergo a custodial interrogation because he was not under arrest or similarly restrained when the officers questioned him.

Even if this Court finds that Bannon confessed while in custody, his Fifth Amendment rights were not violated because his confession to selling MDMA was admissible under the public safety exception. Public safety concerns can supersede the requirement to notify individuals of their Fifth Amendment rights. See New York v. Quarles, 467 U.S. 649, 657 (1989) (creating the public safety exception). Under the public safety exception, a defendant's statements to police are admissible despite an officer's failure to read the defendant his Miranda rights if the questioning is necessary to protect the officer's safety or the public's safety. Id. Even if Bannon was in custody, the public safety exception applies because harmful drugs posed an immediate risk to the public. Bannon was not in custody during his interrogation, and even if this

Court disagrees with both the magistrate judge and trial judge, the public safety exception allowed the officers to question him without providing the Miranda notice.

A. Bannon was not in custody when he confessed to selling MDMA because the officers questioned him for less than thirty minutes in the comfort of a familiar setting, and they never threatened, physically restrained, or denied him the opportunity to leave.

In evaluating the totality of the circumstances, a person is considered in custody when the restraint on freedom of movement is of the degree associated with a formal arrest. See Stansbury v. California, 511 U.S. 318, 322 (1994). A court will weigh four factors when looking at the totality of the circumstances: 1) the site of the interrogation, 2) the length of the interrogation, 3) whether the officers threatened the defendant, and 4) whether the officers physically restrained or denied the defendant the opportunity to leave. See Howes v. Fields, 132 S.Ct. 1181, 1193 (2012); Maine v. Thibodeau, 475 U.S. 1144, 1146 (1986); Oregon v. Mathiason, 429 U.S. 492, 494 (1977); Orozco v. Texas, 394 U.S. 324, 327 (1969); Miranda, 384 U.S. at 491-92; United States v. Matcovich, 522 F. App'x 850, 851-52 (11th Cir. 2003).

Questioning a defendant in a familiar setting weighs in favor of finding a non-custodial interrogation. See Miranda, 384 U.S. at 491-92; Matcovich, 522 F. App'x at 851. In Miranda, officers questioned a criminal suspect behind the closed doors of a police station's interrogation room. Miranda, 384 U.S. at 445. The Court determined that the defendant was in custody in part because the officers interrogated the defendant in the unfamiliar setting. Id. at 456-57. On the other hand, in Matcovich, multiple officers surrounded the defendant in his home during the execution of a search warrant. Matcovich, 522 F. App'x at 851-52. Although this Court noted that this created a "police dominated atmosphere," this Court ultimately found the defendant was not in custody and stated that it is much less likely to find the circumstances custodial if the interrogation occurs in familiar surroundings, such as the defendant's home. Id.

Unlike Miranda, officers did not question Bannon in a closed room or an unfamiliar setting. Miranda, 384 U.S. at 445; R. at 10, 24-25. Similar to Matcovich, the officers simply asked him to step outside his boat and questioned him near his purported home. Matcovich, 522 F. App'x at 851-52; R. at 8, 10, 25. The familiar site of the interrogation weighs in favor of finding Bannon's interrogation non-custodial.

An interrogation that lasts fewer than thirty minutes weighs in favor of finding a non-custodial interrogation. See Fields, 132 S.Ct. at 1193 (finding a five-to-seven-hour interrogation weighs against non-custodial interrogation); Mathiason, 429 U.S. at 495 (determining a thirty-minute interrogation weighs in favor of non-custodial interrogation); Miranda, 384 U.S. at 491-96 (deciding a two-hour interrogation weighs against non-custodial interrogation). In Mathiason, officers only questioned the defendant for thirty minutes, and the Court determined that this amount of time weighed in favor of finding a non-custodial interrogation. See Mathiason, 429 U.S. at 495. Similar to Mathiason, the officers likely questioned Bannon for no more than thirty minutes. Id.; R. at 8, 10. The amount of time the officers questioned Bannon weighs in favor of finding a non-custodial interrogation.

The absence of threats against a defendant during an interrogation weighs in favor of finding a non-custodial interrogation. See Fields, 132 S.Ct. at 1193; Thibodeau, 475 U.S. at 1144; Miranda, 384 at 476. In Fields, visiting officers questioned an inmate in jail. Fields, 132 S.Ct at 1181. The Court determined that even though the prison confined the inmate, he was not in custody, in part, because the officers did not threaten him. Id. In Thibodeau, officers questioned a defendant while he sat in the back of a police car. See Thibodeau, 475 U.S. at 1146. The Court similarly determined that, even then, the defendant was never in custody; again, the court used the fact that the officers never threatened the defendant to support its decision. Id. at

1146-47. However, Miranda states that any evidence of officers threatening, tricking, or cajoling the defendant to waive his rights will weigh in favor of custodial interrogation. Miranda, 384 U.S. at 476. The officers in Bannon's case did not do any of those things; they even tried to make Bannon feel comfortable by asking if he was okay when he vomited. R. at 10. Bannon's interrogation is more similar to Fields and Thibodeau because the officers never threatened him, and they did not attempt to trick or cajole him into providing incriminating information. See Fields, 132 S.Ct. at 1193; Thibodeau, 475 U.S. at 1146; R. at 8, 10. The fact that Bannon was never threatened weighs in favor of finding his interrogation non-custodial.

Similarly, not physically restraining or denying a defendant the opportunity to leave during an interrogation weighs in favor of non-custodial interrogation. See Thibodeau, 475 U.S. at 1146; Orozco, 394 U.S. at 327; Matcovich, 522 F. App'x at 852. The officers in Matcovich handcuffed the defendant, and this Court determined that the use of handcuffs weighs in favor of custodial interrogation. See Matcovich, 522 F. App'x at 852. Similarly, the officers in Orozco did not allow the defendant "to go where he pleased," and the Court weighed this in favor of custodial interrogation. Orozco, 394 U.S. at 325. In contrast, the defendant in Thibodeau voluntarily entered a police car and never asked to leave for over ninety minutes. See Thibodeau, 475 U.S. at 1146. The Court held that the defendant was not in custody, in part, because the officers did not physically restrain or deny him the opportunity to leave. Id.

During Bannon's interrogation, the officers never restrained or denied him the opportunity to leave. Bannon, similar to Thibodeau, willingly sat on the dock for questioning with little-to-zero pressure from the officers, even if at first he may have been slightly uncooperative. Id.; R. at 8. Asking Bannon to sit is very different than restraining him; Bannon never tried asking to leave, walking away, or returning to the cabin of his nearby boat. R. at 10,

24-25. Further, unlike Matcovich and Orozco, the officers never physically restrained Bannon with handcuffs or prevented him from going where he pleased. Id. at 8. The officers never restraining or denying Bannon the opportunity to leave weighs in favor of a non-custodial interrogation.

Considering the totality of the circumstances, all of the factors weigh in favor of finding Bannon's interrogation non-custodial, and therefore his confession was properly admitted.

B. Even if Bannon was in custody, the public safety exception applies because harmful, unknown drugs were making people very sick and posed an immediate risk to the public.

An officer may question a defendant before administering Miranda rights if the questioning is necessary to protect the safety of the officer or the public. See Quarles, 467 U.S. at 651. The public safety exception is applicable if it is reasonable for the police to ask a question to immediately dissolve a perceived danger. See id.; United States v. Newsome, 475 F.3d 1221, 1225 (11th Cir. 2007) (explaining that broad questions are allowed under the exception).

A missing gun that could harm the public is a perceived danger that allows officers to question a defendant under the public safety exception because the officers need to immediately dissolve the gun's danger. See Quarles, 467 U.S. at 651. In Quarles, the defendant was in a crowded supermarket when an officer took him into custody; but before providing Miranda rights, the officer noticed an empty gun holster on the defendant and asked where the gun was. Id. at 652. The Court permitted the question because the missing gun created an immediate threat to the public's safety, and it was reasonable for the police to ask a question in an attempt to immediately dissolve the gun's perceived danger. Id. at 657-58. In support of their decision, the Court noted that the officers were not trying to elicit testimonial evidence because the officer only asked the question necessary to locate the missing gun. Id. at 659.

If safety is at issue, asking a broad question which may elicit other information does not prevent the application of the public safety exception. See Newsome, 475 F.3d at 1225. In Newsome, officers were arresting the defendant in a motel room, but before the officers Mirandized him, the officers asked the man if there was anything or anyone in the room that they should know about. Id. This Court noted that the officers were acting reasonably to not only protect themselves but the other motel guests as well. Id. This Court stated that the questioning was permitted under the public safety exception because officers are not expected to craft a perfect question in the heat of the moment, and, because safety was at issue, the fact that the question was broad enough to elicit other information does not prevent the exception's application. Id.

The officers in Bannon's case needed to act quickly for the public's safety because the drugs' capacity to harm others posed an immediate threat to the public, and several students were already very ill. R. at 6, 10. The harmful drugs posed a threat to the public similar to the gun in Quarles because both the drugs and the gun had the capacity to seriously harm people. See Quarles, 467 U.S. at 651. The officers in Bannon's case suspected that MDMA was making the students sick but did not know exactly what was in the drugs. R. at 6, 7, 10. Objectively viewed, the officer's question, "what the hell did you give them?" could be an attempt to try to elicit information to help protect the public. The officers were not trying to elicit testimonial evidence but instead were acting similar to the officers in Quarles by asking one question in an attempt to mitigate danger to the public. Quarles, 467 F.3d at 659. Further, as Newsome points out, when safety is at issue, officers are not expected to craft a perfect question in the heat of the moment, and the fact that the officer's question was broad enough to elicit other information does not prevent the exception's application. Newsome, 475 F.3d at 1225. Safety was at issue, and by

quickly asking Bannon this question before notifying him of his Miranda rights, the police were trying to limit the potential danger to the public by determining what exactly was making the students sick.

Even if Bannon was in custody, the public safety exception permitted the officers to question him because dangerous, unknown drugs were making people sick.

CONCLUSION

The district court properly admitted Bannon's confession to selling MDMA. Bannon was not under custodial interrogation when he confessed to selling MDMA, and even if he was, the public safety exception applied. Therefore, the trial court properly admitted the evidence, and this Court should affirm Bannon's conviction.

Respectfully submitted,

Applicant Details

First Name	**Meaghan**
Middle Initial	**V**
Last Name	**Geatens**
Citizenship Status	**U. S. Citizen**
Email Address	**meaghan.geatens@gmail.com**
Address	**Address** Street **2323 Race St., Unit 508** City **Philadelphia** State/Territory **Pennsylvania** Zip **19103** Country **United States**
Contact Phone Number	**2153752161**

Applicant Education

BA/BS From	**Drexel University**
Date of BA/BS	**March 2017**
JD/LLB From	**Villanova University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23906&yr=2010**
Date of JD/LLB	**May 15, 2020**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Villanova Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia, Pennsylvania**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Ravenell, Teressa
ravenell@law.villanova.edu
610-519-7078
Schroeder-Fenlon, Jillian
jillian.schroederfenlon@nyu.edu
212-998-6375

References

Deeya Haldar â€“ Clinic Professor
(610) 519-3061
deeya.haldar@law.villanova.edu

Teri Ravenell â€“ Law Professor
(610) 519-7078
ravenell@law.villanova.edu

Josephine Nelson â€“ Law Professor (was her research assistant during 3L)
jsnelson@law.villanova.edu (email with callback number)

Richard Goldberg â€“ My supervisor at the U.S. Attorneyâ€™s Office, and one of my professors during 2L
(215) 977-4060
Richard.Goldberg@lewisbrisbois.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a recent graduate of Villanova University's Charles Widger School of Law. I write to express my interest in a clerkship in your chambers beginning in August 2021.

I believe my work experience and writing skills will make me a strong addition to your chambers. My experience as an English major and newspaper editor during undergraduate, work in the communications field, and various positions during law school have allowed me to hone a unique set of writing and research skills. During the course of my legal internships and clinic experiences, I have drafted memos, motions, complaints, and affidavits.

My resume, unofficial transcript, writing sample, and letters of recommendation are attached with this application. Please let me know if there is any other information you need from me. I hope to have the chance to discuss the clerkship position with you soon.

Respectfully,

Meaghan Geatens

MEAGHAN V. GEATENS
109 S. 21st St., Apt. 8 • Philadelphia, PA 19103
215-375-2161 • mgeatens@law.villanova.edu

EDUCATION

Villanova University Charles Widger School of Law, Villanova, PA
J.D., *magna cum laude*, May 2020
GPA: 3.72
Honors: Order of the Coif, *Villanova Law Review* Law Review Dedication Award
Activities: Managing Editor of *Tolle Lege*, *Villanova Law Review*; President, Criminal Law Society; 3L Representative, Honor Board; Women's Law Caucus; Brehon Law Society
Publication: Comment, *Correcting Corrections: Discrepancies in Defining State Manslaughter as a "Crime of Violence" for the Purpose of Federal Sentencing,* 64 VILL. L. REV. 309 (2019).

Drexel University, Philadelphia, PA
B.A. in English, Philosophy minor, Certificate in Writing & Publishing, *magna cum laude,* March 2017
GPA: 3.83
Honors: Dean's List, Dr. Geraldine Cox Leadership Scholarship
Activities: Standards, Nominating, & Parliamentarian Chairwoman, Alpha Sigma Alpha Sorority; Sports Section Editor, *The Triangle:* Drexel's Independent Student Newspaper; Women's Club Basketball Team

Ursinus College, Collegeville, PA
August 2013-May 2014
GPA: 3.74
Activities: NCAA Div. III Women's Basketball

EXPERIENCE

Faegre Drinker Biddle & Reath, Philadelphia, PA
Incoming Associate

Villanova University Charles Widger School of Law, Villanova, PA
Research Assistant to Professor Josephine Nelson, August 2019-May 2020
Conducted legal research and prepared memoranda on topics relating to the Thirteenth Amendment and Labor/Employment, specifically in connection to modern management and culture systems.

Villanova University Charles Widger School of Law, Villanova, PA
Certified Legal Intern at Villanova Civil Justice Clinic, August 2019-May 2020
Interviewed and counseled clients about various family law proceedings and landlord/tenant disputes. Appeared in Montgomery County and Philadelphia County Family Courts, and Philadelphia County Municipal Court under attorney supervision. Cases included custody cases seeking Special Immigrant Juvenile Status; a landlord/tenant dispute; and a Protection from Abuse order. Drafted and filed a motion and a complaint. Conducted legal research on issues including asylum, proper court procedure locally, and various other topics.

Drinker Biddle & Reath LLP, Philadelphia, PA
Summer Associate, May 2019-July 2019
Conducted legal research and drafted memoranda. Research projects included work for the firm's White Collar, Labor & Employment, Insurance Litigation, and Corporate practice groups. Attended a deposition in a mass torts case; attended an evidentiary hearing for a temporary restraining order in an employment matter.

The Honorable Jane Roth, United States Court of Appeals for the Third Circuit, Philadelphia, PA
Judicial Intern, September 2018-December 2018
Drafted memoranda and completed legal research on pro se motions and appeals. Assisted law clerks with various research questions. Observed Third Circuit oral arguments.

United States Attorney's Office for the Eastern District of Pennsylvania, Philadelphia, PA
Summer Intern – Criminal Division, May 2018-July 2018
Conducted legal research and drafted memoranda, motions, affidavits, and criminal history documents to assist AUSAs in case preparation. Compiled evidentiary files to support AUSAs in pre-indictment process. Observed in and out-of-court stages of federal prosecutions, including trials, hearings, and witness preparation sessions.

Dechert LLP, Philadelphia, PA
Media Relations & Communications Assistant, March 2016-August 2017
Compiled press alerts that were circulated firm-wide on a weekly basis. Drafted press releases, attorney biographies, and firm award submissions. Assisted with firm's social media efforts, content campaigns, and content management. Pitched lawyers'

thought-leadership articles to place articles with legal publications. Coordinated attorney photoshoots. Aided in firm video marketing efforts (conducted interviews, transcribed video, and pieced together relevant footage transcripts).

Montgomery County District Attorney's Office, Norristown, PA
College Intern, May 2014-August 2014

INTERESTS

Basketball enthusiast and have four years of experience as a volunteer coach of an AAU basketball team. I also enjoy reading poetry and cooking.

Meaghan Geatens
Villanova University School of Law
Cumulative GPA: 3.72

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Ravenell	A-	4	
Criminal Law	Bostick	A	4	
Legal Analysis, Rsch & Wrtg I	Schroeder-Fenlon	A-	2.5	
Professional Development		P	.5	
Torts	Brogan	A-	4	

Winter 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Bus and Fin Literacy for Lawyer		P	1	

Villanova's business literacy module.

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Brennan	A	3	
Contracts	Saiman	A-	4	
Contracts Practicum	Saiman	H	1	H signifies a high pass in practicum.
Criminal Procedure: Investigations	Ravenell	A-	3	
Legal Analysis, Rsch Wrtg II	Schroeder-Fenlon	B+	2.5	
Professional Development		P	.5	
Property	Aagaard	A	4	

Summer 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Externship: General	McGovern	P	3	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Rights Litigation: Enforcing the Constitution	Ravenell	A-	3	
Crime & Emerging Technology	Goldberg	A	2	
Evidence	Caudill	A-	4	
Journal: Law Review	Lanctot	P	1	
Pennsylvania Civil Procedure	Larrimore	A	2	
Professional Development II		P	.5	

Trial Advocacy - Basic Intensive	DeFusco	B	2	

Winter 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Aspects of the Law		P	1	

Villanova's business literacy module.

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law II	Samahon	B+	3	
Criminal Procedure: Adjudication	Chanenson	A-	3	
Deposition Strategy & Tactics	Youman	A	2	
Gender and the Law	Dempsey, Testy, & Juliano	A	2	
Journal: Law Review	Lanctot	P	1	
Legal Writing 3: Litigation	Webb	B+	2	
Professional Development II		P	.5	
Trial Advocacy - Basic Intensive	DeFusco	B	2	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Organizations	Lund	A-	4	
Civil Pretrial Practice	Kaplan	A	2	
Clinic: Civil Justice	Haldar	A	6	
Journal: Law Review	Lanctot	P	1.5	
Moot Court Competition Reimel	Webb	P	1	
Professional Development III		P	.5	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Clinic: Advanced	Haldar	P	4	
Directed Research	Ravenell	P	2	
Journal: Law Review	Lanctot	P	1.5	
Legal Profession	Brogan	P	3	
Professional Development III		P	.5	
Villanova Sentencing Workshop	Chanenson	P	3	

Graduated magna cum laude, and received Order of the Coif membership.

Grading System Description

Standard curve grading, with Professional Development class as pass-fail. Externships, practicum, moot court competition, and journal are also graded pass/fail at Villanova. All grades from Spring 2020 were graded P/F due to COVID-19.

TERESSA E. RAVENELL
ASSOCIATE DEAN FOR FACULTY RESEARCH AND DEVELOPMENT
PROFESSOR OF LAW
CHARLES WIDGER SCHOOL *of* LAW

August 24, 2020

The Honorable Magistrate Judge Elizabeth Hanes
United States District Court
Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Application for Meaghan Geatens

Dear Judge Hanes:

I am writing this letter on behalf of Meaghan Geatens, a recent graduate of Villanova University Charles Widger School of Law who is applying for a clerkship position in your chambers for 2021. I have had the pleasure of working with Ms. Geatens in several classes during her course of study at Villanova Law, including a directed research project, and it is with great enthusiasm that I recommend her to you now.

As Ms. Geatens's resume makes plain, she was an active member of the Villanova Law School community. She was a staff writer for Villanova Law Review, a representative on the Honor Board, Secretary of the Criminal Law Society and is a member of the Women's Law Caucus and the Brehon Law Society. Additionally, Ms. Geatens has excelled academically. She graduated with a 3.72 GPA, which placed her in the top 10% of her class.

Because much of the aforementioned information can be discerned from Ms. Geatens's transcript and resume I would like to focus on those things that may not be so readily apparent. As previously noted, I have had the pleasure of working with Ms. Geatens in several course: Civil Procedure (Fall 2017), Criminal Procedure Investigations (Spring 2018), and Civil Rights Litigation Enforcing the Constitution (Fall 2018) and a Directed Research Project (Spring 2020). Ms. Geatens performed very well in each of these classes, earning an A- in each. She has a strong grasp of the law and gives careful thought and attention to whether the specific facts of a case should affect the outcome. I remember one instance in Civil Procedure in which the class was discussing the phrase "someone of suitable age of discretion" in Rule 4(e) of the Federal Rules of

299 North Spring Mill Road | Villanova, Pennsylvania 19085 | PHONE 610 519-7078 | FAX 610 519-6282 | ravenell@law.villanova.edu | law.villanova.edu

Procedure. Ms. Geatens noted that the rule likely did not require that the person be 18 but, in the absence of a bright line rule, this interpretation would lead to unpredictability. Specifically, she noted that her almost sixteen-year-old brother "would probably lose the papers." Ms. Geatens has a sharp wit, subtle humor, and quiet confidence. I have particularly enjoyed watching her confidence grow over the course of her studies. In Civil Rights, she was an active participant and someone who I could trust to offer thoughtful, reasoned, commentary to further the class discussion.

Not surprisingly, Ms. Geatens' directed research project was impressive. She pulled together a number of different areas of law --- criminal law, tort law and civil rights law --- to argue that civil defendants being sued for malicious prosecution should be denied witness immunity when a court finds that they have perjured themselves in the underlying criminal case. It is a thoughtful project of publication quality.

Ms. Geatens is smart, disciplined, kind, and collegial. I am certain she will be an asset to you should you choose to hire her. It is with great confidence and enthusiasm that I encourage you to offer her a position in your chambers. Please do not hesitate to contact me by telephone or e-mail should you have additional questions about Ms. Geatens.

All the Best,

Teressa E. Ravenell
Professor of Law
Villanova University School of Law

299 North Spring Mill Road | Villanova, Pennsylvania 19085 | PHONE 610 519-7078 | FAX 610 519-6282 | ravenell@law.villanova.edu | law.villanova.edu

Jillian Schroeder-Fenlon
Associate Director
Business Transactions Clinic
New York University School of Law
245 Sullivan Street, 525
New York, NY 10012

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Meaghan Geatens

Dear Judge Hanes:

I am writing to recommend Meaghan Geatens for a clerkship in your chambers. Ms. Geatens was a student in my first-year Legal Research, Analysis, Writing & Communication class during the 2017-2018 school year at Villanova University Charles Widger School of Law where I was a Visiting Assistant Professor of Law.

Ms. Geatens is professional, respectful, sincere, and personable and I thoroughly enjoyed getting to know her during our year-long course. We met one-on-one many times throughout the year to discuss course material and feedback on her work product and I was impressed by Ms. Geatens' dedication, sense of humor and ability to respectfully receive constructive criticism. She was always well-prepared for our meetings and appreciative of the feedback she received. Being able to take and process feedback is an essential skill for all junior attorneys. Ms. Geatens' sense of humor and professional attitude would make Ms. Geatens an asset to your chambers.

Ms. Geatens consistently asked thoughtful questions that were demonstrative of her ability to take initiative. She asked questions that demonstrated that she had spent considerable time thinking through and researching issues and problems before coming to me with questions. Because Ms. Geatens had taken the initiative to understand the issues and problems before we met, she and I were able to engage in a productive and substantive conversation. She also has the self-awareness to recognize when a question or clarification is necessary and does so in a timely fashion. This is not true of many of her peers and this self-awareness will serve her well in the legal profession.

In class, Ms. Geatens was always prepared and engaged. She also is diligent and has a strong work ethic. Ms. Geatens consistently demonstrated a clear commitment to improving her writing skills and written work product. She always incorporated feedback into subsequent written work and her written work product showed effort, reflection, and care. Ms. Geatens' written work product is strong and was consistently among the top students in the class. I was not surprised when Ms. Geatens was selected for law review.

I recommend Ms. Geatens to you without reservation and strongly urge you to consider her application favorably.

Sincerely yours,

Jillian Schroeder-Fenlon, Esquire

MGEATENS – Sentencing Memorandum

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)
	)
v.	)
NOVAK STALLINGS,	)
Defendant	)

Defendant's Sentencing Memorandum

Introduction and Overview

Mr. Novak Stallings, by his attorney, Meaghan Geatens, respectfully requests this Court, the Honorable Judge Rappaport, to consider the following facts, law and arguments before determining what type and length of sentence is sufficient, but not greater than necessary, to comply with the statutory directives delineated in 18 U.S.C. § 3553(a). Two letters have also been sent to this Court on Mr. Stallings' behalf and will also be referenced in connection with this memorandum. They provide insightful descriptions of Mr. Stallings' character and his importance in his communities, and additionally give proof of an offer of employment that Mr. Stallings has received at a non-profit organization. Given Mr. Stallings' personal characteristics in conjunction with the directives in 18 U.S.C. 3553(a), the defense suggests that a period of home detention (with leave to take his sick father to medical treatment when necessary, to visit his 8-year-old son, and also the ability to go to work each day) would be sufficient to comply with the goals of sentencing.[1]

[1] As discussed in *United States v. Booker*, 125 S. Ct. 738, 756 (2005), the most relevant inquiry in sentencing is controlled by 18 U.S.C. § 3553; while considering the Sentencing Guideline

MGEATENS – Sentencing Memorandum

This memorandum is comprised of several parts: first, objections to the information in the Presentence Report and second, an analysis of the § 3553 factors as applicable in Mr. Stallings' case.

A. <u>Objections to Presentence Report</u>

The defenses' main objection to the Presentence Report (PSR) is that the amount of loss noted on page two of the report is grossly overstated. The overstatement of the loss amount has a very large impact on the guideline sentence that would correspond to Mr. Stallings, and thus, examining the loss closely is incredibly important. The PRS' estimate of loss being over $5.185 million is both an uncertain number, a number that includes error, and a number that unfairly assesses what would be reasonable for the victim to pay to mitigate their losses in conjunction with the crime committed.

Initially, the PSR notes a loss of a four-million-dollar contract that Silicon Games (SG), the victim company, lost during their outage because the outage showed that they were vulnerable to hacking. However, adding the loss of the four-million-dollar contract to the amount in this case obscures the damage that actually was done here and inserts additional damages that are simply unfounded and uncertain. First, even the PSR notes that this contract only had a likelihood of 50% profitability – therefore, adding four million to the loss instead of two million is simply inaccurate, given that a profit of four million is uncertain and even reported as unlikely by the victim company themselves. Even more importantly, the uncertainty of profitability creates further issues in assessing actual loss. What if the contract was even less than 50% profitable, or even less than 25% profitable? Or, what if the other company had

---

Calculations is important in the statutory analysis, § 3553 is what controls in crafting an appropriate sentence. Thus, this memorandum will analyze the factors set for in § 3553 and their relevance in creating a just sentence for Mr. Stallings.

backed out of the contract for another reason unrelated to SG's breach? It would be unjust to tack on millions of dollars of loss in this case when there is no way to predict whether this contract would have been successful or profitable for SG. For those reasons, the defense asserts that the loss of the contract should not be factored in to the amount of loss at all in this case; the numbers are too uncertain and could create a simply false outcome. While the notes accompanying Section 2B1.1 of the sentencing guidelines create an exception for offenses under 18 U.S.C. § 1030, noting that the loss does *not* need to be reasonably foreseeable, the notes still make clear that loss has to be an actual loss. Here, there was no cost to Silicon Games in the absence of their contract. This would not be a reasonable cost to include because while revenue or business may have been lost, the numbers are far too uncertain. Therefore, the $5.185 million estimate should certainly be reduced to $1.185 million to account for the error in adding an extra four million in uncertain loss.[2]

Next, the numeric value of loss for $1 million dollars of the spacecraft program is completely unfounded. The PSR itself notes that the defendant *attempted* (emphasis added) to steal the program. It was never actually released to anyone else besides the defendant, who already had access as a Silicon Games employee. Therefore, there was no loss here – the program remains protected and the information was never divulged to anyone who was not a

[2] Certain courts have determined that lost business can count as loss. *See United States v. Musacchio,* 590 Fed. App'x. 359 (5th Cir. 2014). However, this case is distinguishable on the note of profitability of the contract. The PSR concedes that SG would have been unlikely to make 100% profit on the contract, and therefore, it would be error to assess damages at 100% of the contract price. While some estimated percentage may be appropriate under the ruling in *Musacchio*, including all four million dollars of damages as loss in this case would not be consistent with the ruling there, where there was an actually estimated loss of business. The numbers in this case do not reflect such an estimate.

company employee. Therefore, the $1.185 million dollar figure noted above (after the subtraction of the four million for lost contract) should be reduced to $185,000 in loss.

Finally, after subtracting the losses that should not be included due to uncertainty and unfoundedness, the PSR notes several different concrete losses that Silicon Games incurred in this case as a result of the attacks on their systems. By hiring a public relations company, a law firm, and a computer security company, SG had to pay $35,000, $75,000, and $75,000 to those companies respectively. These losses are at least certain, given that there is information to support exactly how much money SG had to spend to contract with these different companies. However, the defense asserts that SG still overspent on these initiatives. The investment of a full $75,000 in a law firm seems somewhat unfounded. Given that while there were certainly public relations issues for the company to deal with, there does not appear to be an outburst of litigation resulting from the hack into the SG network – it simply slowed their servers down and may have lost them some prospective business. While hiring an attorney would be important and a foreseeable cost, $75,000 of attorney's fees seems somewhat excessive. In addition, spending $35,000 and $75,000 on a public relations firm and a computer security company also appear to be large expenses, in which the victim could have mitigated their loss finding less expensive alternatives.[3] Cumulatively, the defense argues that the real loss in this case should fall between

[3] The defense concedes that these costs were foreseeable consequences of the crime committed and should be included in the loss amount; however, in some cases, courts have held that excessive fees or hours billed were not foreseeable. *See United States v. Stratman*, 2014 WL 3109805 (D. Neb. 2014). While being foreseeable is not required under the statutory scheme, referring to this caselaw is important in this proceeding, as it shows that some federal judges have exercised discretion in reducing the loss incurred by a victim company.

$40,000 and $95,000, had Silicon Games considered using other companies or better negotiated the prices they needed to pay for these services.[4]

Separately, the defense also objects to the suggestion of a complete computer ban during any supervised release period or home detention as suggested by the probation office. While the defense recognizes that some ban should be necessary (perhaps a ban on communication with servers from foreign countries, or bans on certain messaging sites which would cut off the ability to contact other criminals or facilitate criminal behavior), the concept of a full ban on his computer usage would be both unreasonable and unlawful.[5] In a technological society that is growing increasingly more dependent on technology and computers every day, a complete computer ban would be an unreasonable imposition upon any person, convicted or not.

B. Applying 3553(a) Factors to Mr. Novak Stallings

1. The History and Characteristics of Mr. Stallings and the Nature and Circumstances of the Offense

[4] Finally, should this Court find that these costs were reasonable, the defense objects on the grounds that the numbers provided in the PSR do not match the documents initially submitted by the government detailing the expenses for a PR firm, a law firm, and a cybersecurity firm. Those documents noted that the expenses were $20,000, $25,000, and $85,000, respectively. That total only comes to $125,000 in comparison with the above $185,000. The defense seeks clarification on what number is accurate and asks this court to defer to the $125,000 initially indicated in FD-302 10.

[5] *See United States v. Duke*, 788 F.3d 392 (5th Cir. 2015) (holding absolute lifetime computer ban on child pornography convict unlawful). While *Duke* stands for the proposition that a life ban on computer usage would be unlawful, the defense finds this case persuasive even in case banning all computer usage during a supervised release period. In today's technological society, computers are an essential part of life; regular members of society have a computer on them at all times in form of a cell phone. Limiting all computer usage would limit Mr. Stallings' ability to have a cell phone, to get news, to communicate with his family, and ultimately, to try and assimilate back into normal society and be a productive member of society. It would also inhibit him from doing his job that he has secured at the nonprofit, as he would be working with their online operations. For those reasons, we find *Duke* to support the proposition that any all-out computer ban for any period of time would be an unreasonable way to sentence Mr. Stallings.

a. Mr. Stallings' History and Character

The character traits that make up Mr. Stallings' personality are demonstrated both by the letters sent to this Court on his behalf and the roles that he continually plays as a member of his family, both as a son and father. As the letter from his prospective employer and longtime friend Rowley Robertson indicates, he is a man devoted to caring for his children, and overarching, to fairness. Mr. Stallings has a two-year-old daughter that he lives with and cares for, and also an eight-year-old son who lives across the country in Colorado. As his son does not live with him, Mr. Stallings travels to visit his son when he is able to – not something that he would be able to do from behind bars. Not only would giving Mr. Stallings a hefty prison sentence affect his own psyche negatively by the loss of ability to interact with his children and be a parent, but it would also negatively impact each of his children who rely on the time that they spend with him. Time with parents is crucial during a child's formative years. Given that his older child lives further away and the only time that child has with his father is when Mr. Stallings travels to visit him, a lengthy prison sentence would deprive that child of all connection with his father. In addition, having Mr. Stallings at home as an integral part of the family unit for his two-year-old daughter's sake is highly important. Having her father in the picture will help her grow up and become a productive member of society. If her father is to serve a lengthy prison sentence, she will be deprived of a normal upbringing.

Not only is Mr. Stallings a man devoted to caring for his children, he is also dedicated to caring for his chronically-ill father. As the Presentence Report indicates, and as has been confirmed by his mother, Mr. Stallings occasionally takes his chronically-ill father for medical treatment at the VA Hospital. Mr. Stallings father is an army veteran who requires daily treatment to maintain his health due to his chronic condition. The fact that Mr. Stallings helps

get his father to his treatment reinforces Mr. Stallings dedication as a family-man and someone who genuinely cares for others. In addition to the fact that Mr. Stallings' father relies on him to get to medical treatment, it is important to note that he is chronically-ill, and we are unsure how much time Mr. Stallings' father has left. For that reason, a sentence of home detention or a small-scale prison sentence would be appropriate to allow Mr. Stallings and his father to spend what time they have left together, and also to continue to his father the medical treatment that he needs to survive.

Mr. Stallings has also shown his dedication to others by his involvement in various communities, both in his neighborhood and in his religious life. He has served in the Neighborhood Watch, which provides an important service to his community. In addition, a letter from his all-male religious community, the Universal Life Brotherhood, also relays and substantiates his importance in the lives of those in his religious community. The letter notes that has been devout and useful.

While Mr. Stallings has committed crimes in the past, he has made an effort to rehabilitate from those crimes – a true showing of strength and character. In examining his criminal history, he has a prior DUI charge – however, he served the time associated with that sentence, despite the fact that he did not complete alcohol treatment plan.[6] In addition, he has made progress on the restitution that he owes in his other conviction. While his restitution

[6] The Presentence Report indicates that, with respect to substance abuse, Mr. Stallings still drinks several drinks each day and has occasionally driven under the influence since his DUI conviction. While this certainly presents a safety issue, it is not solely indicative of his ability to change. He served the prison sentence associated with his DUI and recognizes that he has tried to cut down on his alcohol consumption. He accepts responsibility for those shortcomings and wants to change his behavior in connection with this case. In addition, the defense suggests that, if sentenced to home detention, Mr. Stallings could do regular breathalyzer tests with his probation officer to ensure that he is not under the influence.

payments have not been completed, he has paid $1,000 of what he owes, while also trying to provide for his family. While not fully complete in either circumstance, the progress that Mr. Stallings has made shows that he is trying to get on the correct path and can be rehabilitated, and is making an effort to do the right thing.

Finally, in connection specifically with this offense, it is important to note that according to Mr. Stallings, he did not intend to do any harm. He has voiced that he loved working for Silicon Games, and that he never intended to hurt the company or their employees. This is significant in demonstrating Mr. Stallings' state of mind. While his action is undoubtedly criminal, his intent was not malicious. He believes in free information to disengage unfair advantages.

b. Nature and Circumstances of the Offense

In considering Mr. Stallings' sentence, the defense asserts that home detention would still be an appropriate sentence given the circumstance of this offense, which are undoubtedly serious. The defense concedes that Mr. Stallings was a key player in causing an attack that exposed Silicon Games systems to hacks and attacks, and directed traffic to the SG systems that delayed the regular course of SG's business. However, it is worth noting that the slowing of business, while serious, was not the most important issue in this case – the biggest issue was the space simulation program that was nearly exposed. Most importantly, the defense asserts that while Mr. Stallings created computer damage in the course of his actions, his ultimate objective was not fully carried out as he never exposed or actually sold the space simulation program. While he himself gained access to the Silicon Games spacecraft program, that program was never actually divulged to others – and as an employee, he was allowed access to the spacecraft program anyway. The program is likely too large for Mr. Stallings to have memorized –

therefore, in this vein, Silicon Games did not suffer a loss with respect to his knowledge of the program alone – even as a regular employee he would have had access to the program. Their program and trade secret remains in-tact and has not been exposed to anyone who didn't work at the company. Silicon Games will still be able to profit off of their program. Therefore, while the attacks on the servers were certainly serious, it is important to consider that the most serious part of this offense was never even carried out as no trade secrets were exposed to any other foreign companies or nations.

2. <u>The Need for the Sentence Imposed to Promote Certain Statutory Objectives:</u>

a. to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense,

b. to afford adequate deterrence to criminal conduct,

c. to protect the public from further crimes of the defendant, and

d. to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Next, the Court must consider how the sentence imposed would support the four above objectives. With respect to prong a), the defense argues that any sentence will reflect the seriousness of the offense and provide just punishment and respect of the law; Mr. Stallings has never spent more than two days in jail, and has never spent any amount of time on house arrest. Even keeping him confined to his home for a period of months will put significant restrictions on his freedom and show him the seriousness of the crime that he has been convicted of. Similarly, with respect to prong b), a sentence of relatively low incarceration time or house arrest will deter similar criminal conduct in other defendants (and will provide specific deterrence in Mr. Stallings). The individuals who commit crimes similar to that of Mr. Stallings are smart

individuals, generally with white-collar jobs in successful companies. They are unlikely to have ever served any prison sentence or had any significant restraints on their freedom. Any sentence presenting impositions on their freedom would demonstrate a reason not to commit crimes similar to that that Mr. Stallings has been convicted of, as no one wants to be deprived of their liberty to come and go as they please.

With respect to prong c, a sentence of home detention (or even a short prison sentence followed by supervised release) would protect the community from additional crimes committed by the defendant if there is some kind of limited ban on his computer use that inhibits him from contacting services that place outages and attacks on servers.

With respect to prong d, it is obvious that Mr. Stallings is a smart man – he would not require vocational or educational training while incarcerated, which would mitigate the need for a prison sentence and instead promote the idea of a home detention sentence. This is supported not only by his computer skills, but also by the fact that he already has a job offer that he could take if sentenced to home detention. Similarly, while Mr. Stallings does drink on a regular basis, his alcohol consumption does not seem rise to the level of alcoholism (not indicated in the PSR) and thus he would not require an in-prison medical treatment for his alcohol use – he has no other drug addictions or medical conditions that would require regular and consistent medical attention. For these reasons, a sentence of home detention would be appropriate under prong d as he requires no vocational or medical needs.

3. <u>The Kinds of Sentences Available</u>

Because *United States v. Booker* eliminated the mandatory requirement for federal judges to sentence within a particular guideline range, the sentencing guidelines are advisory and thus at

the discretion of this Court.[7] Authorized sentences include a term of probation or home detention, a fine, or a term of imprisonment.[8]

4. The Sentencing Range Established by the Sentencing Commission

The defense maintains that the 18 levels scored for the amount of loss in the Presentence Report (noted for a loss of more than 3.5 million dollars and less than 9.5 million dollars; the PSR estimates loss at 5.185 million dollars) overstates the true amount of loss in this case and therefore, the sentencing range recommended by the guidelines is too harsh for the offense actually committed. Instead, the defense asserts that the true loss would be scored appropriately for a loss of more than $40,000, which would decrease the sentencing score from adding 18 levels, to instead adding 6 levels.[9] As the PSR notes, this would make home detention an option for sentencing, or alternatively, a sentence of 6-12 months imprisonment.

5. Need to Avoid Unwarranted Disparities in Sentences

Because there are no other defendants in this case, the need to avoid unwarranted disparities in sentences is of less weight in this case. However, the defense notes that just because Mr. Stallings is the only defendant does not mean that this Court should make an example of him during sentencing. Instead, the defense asks this Court to consider with heavier weight the other 3553(a) factors.

6. Need to Provide Restitution to the Victims

Mr. Stallings has a job offer to work at a non-profit. If he were offered a sentence of home detention, with leave to attend work each day, he would be able to make contributions to the restitution he would owe the victim company in this case. If incarcerated, he would make

[7] See *Booker,* 125 S. Ct. at 756.
[8] See 18 U.S.C. § 3551(b) (describing authorized sentence for individuals).
[9] *See* Orin S. Kerr, *Computer Crime Law* (4th Ed. 2018), at 370 (Table).

nowhere near what he would be able to make working outside the prison walls and therefore unable to meaningfully contribute to the restitution he will owe in this case, in addition to the restitution still owed for his 2016 conviction. This equally applies if he is to receive a prison-sentence – elongated his time in prison will elongate the time that he is unable to make money to meet his restitution requirements and to offset what he has done.

Conclusion

For the reasons aforementioned, the defense respectfully requests that this Court impose a sentence of home confinement on Mr. Stallings, with ability to leave for work, to visit his child, and to take his ill father to medical treatment. This sentence would follow the directives of 18 U.S.C. § 3553, and be sufficient but not greater than necessary to promote the objectives of sentencing under the law – Mr. Stallings could be of use to his family, of use as a member of the workforce, and of use in contributing to the restitution costs that he will owe in connection with this case if given a sentence of home confinement.

Applicant Details

First Name	**Sami**
Last Name	**Ghanem**
Citizenship Status	**U. S. Citizen**
Email Address	**sg3wu@virginia.edu**
Address	**Address** Street **525 Seymour Road, Apt 1** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**8054180755**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**March 2019**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of Social Policy and the Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Lile Intramural Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Organization**

Recommenders

Frampton, Thomas
tframpton@law.virginia.edu
(434) 924-4663

Hodges, Ann
ahodges@law.virginia.edu
804-339-9440

Rutherglen, George
grutherglen@law.virginia.edu
(434) 924-7015

References

Professor George Rutherglen: grutherglen@law.virginia.edu, home phone number is 434-977-0687, office phone number is 434-924-7015,
Professor Ann Hodges: 804-339-9440, ahodges@law.virginia.edu
Professor Thomas Frampton: 202-352-8341, tframpton@law.virginia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sami Ghanem

525 Seymour Road, Apt 1, Charlottesville, VA 22903
(805) 418-0755 • sg3wu@virginia.edu

April 9, 2022

The Honorable Elizabeth W. Hanes
U.S. District Court, Eastern District of Virginia
401 Courthouse Square
Alexandria, VA 22314

Dear Judge Hanes:

I am a third-year law student at the University of Virginia School of Law and I am interested in a position in your chambers as a law clerk for the 2022-2023 term. I firmly believe that a clerkship in your chambers is the best way for me to begin my litigation career, particularly through exposure to a wide variety of litigation from start to finish. I have lived in Virginia for the past 3 years and I am interested in returning in order to practice

Enclosed within my application is my resume, my law school transcript and my undergraduate transcript. I have also enclosed my writing sample of a case comment on *Spencer v. Virginia State University*, prepared during my independent study class with Professor George Rutherglen, and my writing sample of a memo on Second Circuit common law regarding good-faith jury instructions, prepared during my summer position at Fried Frank. Professor George Rutherglen, Professor Ann Hodges, and Professor Thomas Frampton have agreed to submit letters of recommendation on my behalf to your chambers. They have also gladly agreed to directly speak to you regarding my application. Professor Rutherglen's home phone number is 434-977-0687 and his office phone number is 434-924-7015; Professor Hodges' phone number is 804-339-9440; Professor Frampton's phone number is 202-352-8341.

Thank you for your consideration of my application.

Sincerely,

Sami Ghanem

Sami Ghanem

525 Seymour Road, Charlottesville, VA 22903 • (805) 418-0755 • sg3wu@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022

- *Virginia Journal of Social Policy and the Law*, Editorial Board Member
- Muslim Law Student Association, President, Treasurer, Member-at-large
- Middle Eastern and North African Association, Treasurer
- National Lawyers Guild, Treasurer
- American Constitutional Society, Membership Development Chair
- Lile Intramural Moot Court Competitor
- Virginia Law Ambassador
- Innocence Project Pro Bono

University of California, Santa Barbara, Goleta, CA
B.A., Political Science, with Honors, June 2019

EXPERIENCE

Fried, Frank, Harris, Shriver & Jacobson LLP, New York, NY
Summer Law Clerk, May – August 2021

- Created memorandum on good-faith jury instruction jurisprudence in the Second Circuit
- Prepared order of protection petition and appeared in family court with pro bono client

Professor George Rutherglen, University of Virginia School of Law, Charlottesville, VA
Research Assistant, May – August 2020

- Analyzed employment law developments and revised textbook for publication

Ventura County Public Defenders' Office, Ventura, CA
Winter Pro Bono Legal Intern, January 2020

- Drafted procedural motions, oral arguments, and memoranda for public defender's cases
- Researched criminal law related to client issues and attended hearings and trials

Office of Congresswoman Julia Brownley, Thousand Oaks, CA
Congressional Intern, January – April 2019

- Communicated daily with constituents and agencies to resolve Social Security, Veterans' Affairs, and immigration-related issues
- Coordinated logistics for district-based projects, such as county art competitions

University of California, Santa Barbara, Goleta, CA
Research Assistant for Professor Laurie Freeman, January – March 2019

- Researched data for books on nuclear waste disposal and a history of yellow journalism

Research Assistant for Professor Hahrie Han, January – June 2018

- Created and organized database for thousands of field observations on U.S. interest groups

Model United Nations at UC Santa Barbara, Goleta, CA
Director-General, August 2016 – June 2018

- Managed UCSB-hosted college and high-school conferences and trained committee chairs
- Represented UCSB in collegiate Model UN national competitions

INTERESTS

Table tennis, soccer (Liverpool FC supporter), chess, biking, hiking, foosball, exploring libraries, fishing

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Sami Ghanem

Date: February 09, 2022
Record ID: sg3wu

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2019			
LAW	6000	Civil Procedure	4	B+	Rutherglen,George
LAW	6002	Contracts	4	B+	Geis,George Samuel
LAW	6003	Criminal Law	3	B+	Bowers,Josh
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B	Barzun,Charles Lowell
		SPRING 2020			
LAW	6001	Constitutional Law	4	CR	Matthew,Dayna Bowen
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	9252	Poverty in Law/Lit/Culture	3	CR	Langlet,Mark F
LAW	6006	Property	4	CR	Johnson,Alex M
LAW	7098	Public Interest Law & Advocacy	2	CR	Shin,Crystal Sue
		FALL 2020			
LAW	6102	Administrative Law	4	B	Duffy,John F
LAW	7022	Employment Discrimination	3	B+	Rutherglen,George
LAW	8813	Independent Research	3	A-	Rutherglen,George
LAW	7059	Labor Law	3	B+	Hodges,Ann C
LAW	7067	National Security Law	3	B+	Deeks,Ashley
		SPRING 2021			
LAW	7123	Class Actions/Aggregate Litgtn	3	B+	Ballenger,James Scott
LAW	9240	Con Law II: Poverty	3	B+	Goluboff,Risa L
LAW	6104	Evidence	4	B+	Brown,Darryl Keith
LAW	8811	Independent Research	1	A	Frampton,Thomas Ward
LAW	9088	Sup Court Justices & Judging	3	B+	Howard,A. E. Dick
		FALL 2021			
LAW	9283	Constitutionalism and Culture	3	B+	Howard,A. E. Dick
LAW	8812	Independent Research	2	A-	Hodges,Ann C
LAW	7189	Internet Law	2	A	Oliar,Dotan
LAW	7071	Professional Responsibility	3	B	Mitchell,Paul Gregory
LAW	9089	Seminar in Ethical Values (YR)	0	YR	Goluboff,Risa L
LAW	8026	Taking Effective Depositions	2	B+	Bognar Searcy,Ellen Catherine
		SPRING 2022			
LAW	6105	Federal Courts	4	NG	Ahdout,Zimra Payvand
LAW	8812	Independent Research	2	NG	Shepherd,Lois L.
LAW	7090	Regulatn of Political Process	3	NG	Gilbert,Michael
LAW	9090	Seminar in Ethical Values (YR)	1	NG	Goluboff,Risa L
LAW	9081	Trial Advocacy	3	NG	Stolpe,Kristin Elysse

April 11, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am happy to write on behalf of Sami Ghanem, who I understand is applying for a clerkship in your chambers. I don't know Sami as well as I know many of the students for whom I write letters, but I did supervise an independent writing assignment he completed last semester, and we had a few lengthy conversations, both about the paper and life, during that process. Sami is outgoing, highly motivated, and polite (almost to a fault), and I think he would make a fine judicial law clerk.

Sami's writing project was a Case Comment on the issue of venue for failure-to-register prosecutions under the Sex Offender Registration and Notification Act (SORNA). He wrote in defense of the Seventh Circuit's approach, United States v. Haslage, 853 F.3d 331 (7th Cir. 2017) (holding venue does not lie in the district from which offender departs), which thus far stands in conflict with every other appellate court to consider the question. He adopts a historical approach, underscoring the importance of the vicinage requirement at common law, and then argues that the Seventh Circuit's idiosyncratic approach is more faithful to this context and the statute's plain text than the alternative. His draft (at least as presently written) breaks little new ground, but it demonstrates an ability to clearly explain the split and marshal a strong argument in favor of his preferred position.

Sami is highly self-motivated and extremely outgoing; you get the sense that he would be comfortable in whatever environment he might be thrown into. (This is, I think, a product of his upbringing: he lived in six different states growing up.) He is currently planning on working for a firm after law school, but he also cares deeply about using the law to address social and political inequality—particularly discrimination against Arab-Americans and Muslim-Americans. Eventually, he hopes to do plaintiff-side work involving employment law, class actions, consumer protection, and environmental law.

If you have any questions or if there is any additional information I can provide, please do not hesitate to contact me via phone (202-352-8341) or email (tframpton@law.virginia.edu).

Best,

Thomas Frampton

Thomas Frampton - tframpton@law.virginia.edu - (434) 924-4663

April 09, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Sami Ghanem

Dear Judge Hanes:

This is a letter of recommendation for Sami Ghanem, who is applying to be a clerk in your chambers. On the basis of Mr. Ghanem's performance in my Labor Law class and my subsequent work with him on his paper on the Equal Pay Act, I strongly recommend him for the clerkship.

I first met Mr. Ghanem as a student in my Fall 2020 Labor Law class. The fall semester was challenging due to the pandemic, resulting in a hybrid class that combined in-person and online students. Mr. Ghanem was one of the students who attended in-person. He quickly proved himself a thoughtful, well-prepared, and enthusiastic participant in class discussion. He was one of a small number of students who made a particularly noteworthy contribution to the discussion in at least one class. He performed well on the exam and short paper also, resulting in a grade of B+ in a very strong class, with a mandated curve and many 3L students.

After the class, Mr. Ghanem reached out to me to review his article on the Equal Pay Act. The article focused specifically on a Fourth Circuit decision addressing the question of whether salary history is a factor other than sex under the statute. The topic Mr. Ghanem chose is the subject of a significant circuit split and one of substantial current importance in the field of gender discrimination. He had a creative introduction to the paper based on his connection to the University of Virginia and its gender-based pay differential among the faculty. The first draft that I read was a very solid piece of legal analysis. Since that time, he has continued to work very hard on the paper, honing his analysis and revising and polishing his writing, resulting in an even better product.

One of Mr. Ghanem's strengths is his desire to continue learn and improve in every respect. He is that rare student who sought detailed feedback on his exam performance. His request that I review his paper on the Equal Pay Act similarly demonstrates that important quality of openness to continual learning and advice from others more experienced.

Mr. Ghanem's summer experiences have helped to prepare him to be successful in the clerkship. Last summer, he did research for Professor George Rutherglen, an expert in employment law. And during the current summer, he is working at the well-regarded law firm of Fried, Frank, Harris, Shriver & Jacobson. His analytical and communications skills will develop further as a result of his work at the law firm.

Mr. Ghanem has been an outstanding citizen of the law school, participating in multiple extracurricular activities. He has been a leader in both the Muslim Law Students Association and the Middle Eastern and North African Association, and served as an Editorial Board member of the Virginia Journal of Social Policy and the Law. He has enhanced his education through involvement in Moot Court and the Innocence Project. His enthusiasm for the law school is reflected in his role as a Virginia Law Ambassador. From my observation, he is respectful and considerate of faculty, staff and students at the law school.

In sum, Sami Ghanem has my strong recommendation for the clerkship with your chambers. In addition to his legal talents, he will be a delightful colleague who will work well with all in chambers. If you have any additional questions about Mr. Ghanem, please feel free to reach out to me at either 804-339-9440 or ahodges@law.virginia.edu.

Sincerely,

Ann C. Hodges
Visiting Professor of Law, University of Virginia
Professor of Law Emerita, University of Richmond

April 12, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing on behalf of Sami Ghanem, a rising third-year law student, who has applied for a clerkship with you. Sami received a B+ in my course in Civil Procedure and a B+ in Employment Discrimination. He also worked as my research assistant last summer. He is capable, inquisitive, and unfailingly courteous. I am happy to recommend him to you.

Both Civil Procedure and Employment Discrimination are demanding courses. They proceed both at the level of technical detail and of fundamental principles. In Civil Procedure, the Federal Rules and decisions interpreting them are intricate and controversial, and the whole course revolves around the meaning of due process. In Employment Discrimination, the burden of proof on a variety of issues is decisive in many cases, and the overall aim of the subject is to foster equality in employment. Sami did quite well in both courses, without getting lost in either the details or the abstractions but in seeing how they each affected each other. He is a very smart and diligent student.

These qualities came out strongly in his work for me as a research assistant. He assisted me in the last stages of publishing a book, where numerous loose ends all have to be tied up. He was exemplary in checking the citations in my manuscript and making sure they were up to date. He proofread the text and made many helpful suggestions. And he also took on the often tedious task of making an index. Without him, it would have been much more difficult to bring this book project to a successful conclusion.

Sami has been very active in the life of our law school, serving in numerous organizations, from the Virginia Journal of Law and Social Policy to the Innocence Project. All of these activities demonstrate his commitment to educating himself as a lawyer, outside as well as inside the classroom. He intends to have a career in litigation and he sees a clerkship as a valuable learning experience, where he can see first hand how cases are litigated and how decisions are made. Just as a clerkship would contribute to his career plans, he would contribute effectively to the work in any judge's chambers.

Sami has met the disruptions to legal education caused by the pandemic with poise and equanimity, adjusting well to the remote learning and social distancing that has dominated the law school experience this year. Based on this experience, I believe, he is well suited to meet the challenges of a clerkship, whatever they might be. He has the intellectual and personal qualities to be an excellent law clerk and I strongly recommend him to you.

Very truly yours,

George Rutherglen

John Barbee Minor Distinguished Professor of Law
Earle K. Shawe Professor of Employment Law
University of Virginia School of Law
580 Massie Road Charlottesville, VA 22903-1738
PHONE: 434.924.7015
FAX: 434.924.7536
grutherglen@law.virginia.edu • www.law.virginia.edu

Sami Ghanem: Analysis Section from "Case Comment: The Fourth Circuit Should Reverse Course on Prior Pay."

i. The language in *Spencer* regarding prior pay is dicta

In the context of the overall opinion, the Fourth Circuit's language on prior pay in *Spencer v. Virginia State University* is clearly dicta. The court stated that "even if Spencer could meet her initial burden, her claim would still fail because the University established that the salary difference was based on a 'factor other than sex.'"[1] The court took the time to first evaluate whether the plaintiff made a prima facie showing of a violation of the Equal Pay Act through the establishment of three elements.[2] After having found that Spencer's claim does not meet the second element of a prima facie claim, the court did not proceed to analysis of the third element,[3] evidently deeming it sufficient that the claim was defeated. Only after having already established that Spencer's claim had failed did the court say, almost as an afterthought, that "*but even* if Spencer could meet her initial burden, her claim would still fail" [emphasis added] because prior pay is a non-sex based factor.[4] Because the language on prior pay is not necessary to the decision of the case, but simply serves as a comment, it fully meets the definition for *obiter dictum*.[5] The section written on prior pay does not affect the overall holding, which is that Spencer's claim fails on the second element of a prima facie claim of a violation under the Equal Pay Act.[6]

Furthermore, the court provided no justification or reasoning to explain why prior pay is a non-sex-based factor, nor why it would fit under the fourth exception of the Equal Pay Act. For such a consequential issue that has created such a divisive circuit split, it is perplexing that the Fourth Circuit

---

[1] *Spencer*, 919 F.3d at 206. This opinion was heard by only a panel from the full Fourth Circuit, rather than the entire court, which lends credence to the idea that the panel was not willing to yet make a definitive ruling on this important issue until the entire court had the opportunity to weigh in.
[2] *Spencer,* 919 F.3d at 203.
[3] *Id.*
[4] *Spencer*, 919 F.3d at 206.
[5] Obiter dictum is defined in Black's Law Dictionary as "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary 1177 (9th ed. 2009).
[6] *Spencer,* 919 F.3d at 203.

cited little authority and provided little reasoning to support its language on prior pay, making it all the more likely that this language is dicta. The Fourth Circuit panel noted that the employer has the burden of asserting an affirmative defense that another non-sex-based factor was the reason for the disparity. This affirmative defense was the university's 9/12ths policy. But the court only addressed the plaintiff's argument that the 9/12ths policy was pretextual because it was applied inconsistently or erroneously, not because it was the use of prior pay.[7]

The court clearly ignored reasoning by the plaintiff and defendant about the status of prior pay. It did not respond to the plaintiff's argument in her opening brief, where she claimed, "*any* policy of transitioning administrators to the faculty at 9/12 of their administrator salary would have a disparate impact on women because VSU's highest-paid administrators were overwhelmingly men" [emphasis added].[8] It ignored the defendants' argument that the Ninth Circuit recently held "'prior salary alone or in combination with other factors cannot justify a wage differential.'… the reasoning of *Rizo* would have no application here."[9]

The court in *Spencer* could have decided to make a decision without adopting the entire holding in *Rizo* on the issue of prior pay, electing to rule narrowly on the facts and circumstances of the case presented before them. The defendants clearly seem to have treated this case in this narrow manner, adding that "should the Court wish to consider *Rizo*… Defendants would respectfully request leave to submit supplemental briefing."[10] In fact, the defendants are probably delighted with the final outcome of this case, because they did not even have to file a supplemental brief on *Rizo* or the subject of prior pay generally before the court contributed its dicta on prior pay. The court did not cite or repeat reasoning

[7] "Even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity." *Id.*
[8] Brief for Petitioner-Appellant at 49, Spencer v. Virginia State University, 2018 WL 1778726 (C.A.4).
[9] *Id*. at 49 fn. 9.
[10] Brief for the Respondent-Appellee, Spencer v. Virginia State University, 2018 WL 2096106 (C.A.4), 49 at fn 9.

from the defendants' brief or the plaintiff's brief, nor did it follow some reasoning present in the circuit split on the issue. The decision to write the opinion in this manner has left clear and obvious gaps that cannot be explained away or taken as solid precedent.

A review of past decisions also does not indicate that the Fourth Circuit has taken a position on the issue of prior pay as a non-sex-based factor. In *Brinkley v. Harbour Recreation Club*, the Fourth Circuit found that an employer may review experience and salary history and use those factors to make compensation decisions.[11] The court's precise language is that the employer "reviewed a resume and salary history, assessed its financial situation, compared its situation with that of other similarly situated entities, and negotiated with [the comparator] to reach a mutually satisfying agreement as to an appropriate salary. The evidence indicates that [the employer] reached this agreement on the basis of [the comparator's] individual merits, not on the basis of his sex."[12] The court in *Brinkley* found that a combination of these factors sufficient to establish that the employer made a decision that was not based on sex in a way that would be impermissible under the Equal Pay Act. This decision is distinct from the language in *Spencer*, because the Fourth Circuit in *Brinkley* talked about a combination of factors as non-sex-based, but does not talk about prior pay individually.

In conclusion, the nature of the language in *Spencer*, the complete lack of reasoning regarding the status of prior pay in the Equal Pay Act, and the absence of prior decisions ruling on prior pay indicate that the Fourth Circuit's language on prior pay in *Spencer* is dicta and that the Fourth Circuit has not made a binding ruling on prior pay yet. District courts within the Fourth Circuit should feel empowered to make rulings that contravene this language. It is also not too late for the Fourth Circuit to reverse course with ease and without precedential barriers.

[11] 180 F.3d 598 (4th Cir. 1999).
[12] *Id.* at 615.

ii. The reasoning of *Rizo* is applicable to the facts of *Spencer*.

The defendants in *Spencer* claimed that the reasoning of *Rizo v. Yovino* has no application to the case at hand,[13] but this is incorrect. The response brief stated that *Spencer* involves prior pay from the same employer whereas *Rizo* involves prior pay from a different employer, so when "the same employer sets an employee's pay for a new position, it may reasonably consider the employee's length of service, experience, and so on, which would be reflected in the employee's prior pay with that employer."[14] Certainly, the same employer could 'reasonably consider' these factors when deciding compensation, but if the old employer is the same as the new employer, those factors are even easier to identify in court. The Ninth Circuit specified that "rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception."[15] Indeed, it is even easier for the same employer of past and present, like Virginia State University in *Spencer*, to justify the current pay based on those other underlying factors, because that employer has had the opportunity to identify those non-sex-based factors during the course of that employee's employment. It would be counterintuitive to the substance of *Rizo* if the court allowed the employer to apply prior pay as a factor in instances where it would be even easier to not use a proxy.

The fact that the past employer and the new employer are the same does not make prior pay permissible under the Equal Pay Act, nor does it mean that the reasoning of *Rizo* is inapplicable to the case of *Spencer*. Adopting the defendants' argument in *Spencer* would be counterintuitive, because it would be allowing an employer an exception from the normal affirmative defense burden just because the old employer is the same as the new one. This is despite the fact that the same employer should have an

[13] Brief for the Respondent-Appellee, *supra* note 76.

[14] *Id.*

[15] *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018).

easier time identifying specific job-related non-sex-based factors that would justify the pay disparity. Additionally, the Ninth Circuit confirmed its total ban on prior pay in 2020,[16] which further defeats the argument by the defendants.

It is true that the Fourth Circuit is not bound by the decision of the Ninth Circuit, leaving the court free to plot its own path on the issue of prior pay. However, while the precedent of *Rizo* is not binding, it is certainly persuasive precedent, because the decision effectively and clearly explained why prior pay does not belong in the fourth exception of the Equal Pay Act by utilizing textual analysis of the EPA and the legislative intent in crafting it. Furthermore, empirical studies should convince the Fourth Circuit that prior pay is likely to be discriminatory on the basis of sex and should thus be avoided in compensation decisions.[17]

iii. Prior pay is a sex-based factor that does not belong to the fourth exception of the Equal Pay Act.

Empirical evidence, textual analysis of the Equal Pay Act, and the legislative intent of the Equal Pay Act all suggest that prior pay is a sex-based factor which perpetuates past discrimination and indicate that prior pay should not be placed in the fourth exception of the Equal Pay Act.

Evidence suggests that discrimination does play a significant role in salary history. Paul Weiler found that a number of legitimate factors could potentially reduce the pay disparity gap.[18] Included among these factors are the hours of work on the job, the length of experience in the labor force, and the location, hazards, and other conditions of work, which if taken into account, would reduce "the maximum level of

[16] "The majority embraces a rule not adopted by any other circuit—prior salary may *never* be used, even in combination with other factors, as a defense under the Equal Pay Act" [emphasis added]. *Rizo*, 950 F.3d at 1232.

[17] See Part II.C.iii.

[18] Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728 (1986).

wage gap to be explained by sex discrimination… [to] the order of ten to fifteen percent."[19] Nevertheless, it is admitted that such a gap would still result in "a substantial injustice" of billions of dollars of loss a year, and "if that annual shortfall is due to current or past sex discrimination, it is an injustice worth tackling..."[20]

Other evidence indicates that the current gender pay gap is caused by historical sex-based factors that usher women and men into different levels of pay. "The single biggest cause of the gender pay gap is occupation and industry sorting of men and women into jobs that pay differently throughout the economy…. Past research suggests this is due partly to social pressures that divert men and women into different college majors and career tracks, or to other gender norms such as women bearing disproportionate responsibility for child and elderly care, which pressures women into more flexible jobs with lower pay."[21] Non-sex-based factors actually account for very little of the difference in the pay gap.[22] Contrary to what the Seventh Circuit suggested,[23] the idea that societal discrimination encourages the shuttling of women into inferior jobs is supported in academic research as well: "Discrimination against women by both men and women, especially in the circumstances identified, helps uphold and maintain gender-linked social roles in society… . Society supports women receiving inferior pay and their being employed in work roles where they have little power and authority, as found by reviewers of empirical

[19] *Id.* at 1784.

[20] *Id.* at 1784-1785.

[21] "In the countries we examined, these factors explain between 14 percent and 26 percent of the gender pay gap, a finding that's consistent with academic literature." Dr. Andrew Chamberlain, Demystifying the Gender Pay Gap 3 (Glassdoor, 2016), https://www.classlawgroup.com/wp-content/uploads/2016/11/glassdoor-gender-pay-gap-study.pdf; Francine Blau & Lawrence Kahn, The Gender Wage Gap: Extend, Trends, and Explanations - NBER Working Paper No. 21913 (2016).

[22] "Differences in level of education, age and experience between men and women—what economists call "human capital"—explain little of the gender pay gap." Chamberlain, *supra* note 88 at 4.

[23] *Wernsing*, 427 F.3d at 467.

studies conducted in many developed countries including the U.S…. Women's lower salaries help ensure that the traditional gender-influenced hierarchical power structure is maintained."[24]

In conclusion, "it would seem reasonable to conclude that some significant portion of the gender wage gap is caused by the practice of underpaying work done primarily by women."[25] Prior pay perpetuates this portion of the gap and therefore should not permitted in compensation decisions. A practice which perpetuates past discrimination would run contrary to the purpose of the EPA.[26]

Next, assuming prior pay is by itself a non-sex-based factor does the work of the defendant. Prior pay is not even a factor, let alone a non-sex-based factor. It is a proxy for other factors, among which is likely to include historical sex-based discriminatory factors. The employer, in responding to a prima facie case alleging sex-based pay discrimination, has the burden of proving that "sex provide[d] no part of the basis for the wage differential."[27] That burden cannot be fulfilled by prior pay. Courts should not just assume that it is enough that "salary retention policies *may* serve legitimate, gender-neutral business purposes, such as the retention of skilled workers who may be needed in the future to perform higher level work"[28] [emphasis added]. The reality is that "the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex."[29] Assuming that prior pay is a non-sex-based factor just because it might possibly act as a proxy for non-sex-based factors is not enough

[24] Phyllis Tharenou, *The Work of Feminists is Not Yet Done: The Gender Pay Gap—A Stubborn Anachronism*, Sex Roles: J. Research 198, 203 (2012).
[25] Weiler, *supra* note 85 at 1790.
[26] *Corning*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

[27] *Rizo*, 950 F.3d at 1228.

[28] *Taylor*, 321 F.3d at 717–18.

[29] *Rizo*, 950 F.3d at 1228.

to displace the defendant's burden in responding to a prima facie case of pay discrimination under the EPA.

A look into the legislative history of the Act indicates that the fourth exception was not designed to include every remaining possible exception that was not mentioned in the first three. Nevertheless, the Eighth Circuit contended that the Equal Pay Act "does not suggest any limitations to the broad catch-all "factor other than sex" affirmative defense."[30] The court suggested that "the legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception."[31]

If the fourth exception were to be boundless and without limits, any possible factor could be alleged that would be a pretext for actual discrimination, and there would be no point in Congress listing the three previous exceptions. The Eighth Circuit also proclaimed that a House Report indicates the exception was meant to be interpreted broadly and without limitation, yet in that very same report, every single factor listed — "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability"[32] — is a job-related factor. The history and the purpose of the Equal Pay Act suggest clear limitations on the fourth exception. For example, "Congress considered a survey of 1,900 employers that showed one in three used entirely separate pay scales for female employees who performed similar jobs to male

[30] *Taylor*, 321 F.3d at 717.

[31] *Id.* (quoting House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 689: "Three specific exceptions and one broad general exception are also listed… . As it is impossible to list each and every exception, the broad general exclusion has also been included."). Note also that the court incorrectly omits the first other from the fourth exception in the EPA, which is "any other factor other than sex."

[32] *Taylor*, 321 F.3d at n.7.

employees."[33] As a result, it did not want to provide an exception that allowed pretexts to be a way out. This is why the House listed only job-related factors in its example of factors which would fit under the fourth exception; allowing for any factor at all to be upheld as an affirmative defense would defeat the purpose of the Act.

The text of the Equal Pay Act also supports the job-related limitations on the fourth exception. The fourth exception is written as "any *other* factor other than sex,"[34] not just "any factor other than sex," which means that the exception needs to be read in relation to the three other exceptions, all of which are job-related as well. The adjective 'other' to modify the word factor implies that it is an 'other' besides the previous factors listed factors, so the fourth factor holds a relation to the previous three. Reading the fourth exception as limitless would mean that the first 'other' is "rendered meaningless, as would the three enumerated exceptions."[35]

Applying the reasoning of this Comment's exploration of the circuit split on the issue of prior pay, future decisions should reject the Fourth Circuit's dicta on prior pay in *Spencer v. Virginia State University*.[36] First and foremost, as the evidence indicates, prior pay is a sex-based factor. Allowing the policy of hiring administrators to professor positions based on 9/12ths of their former salary perpetuates sex-based discrimination that seems to have occurred in the university, and it perpetuates sex-based discrimination that has occurred across the United States. Therefore, asserting prior pay as an affirmative defense under the fourth exception in the Equal Pay Act is not sufficient to displace the burden of production and proof placed on the defendant after the plaintiff has successfully established a prima facie case of pay discrimination. Secondly, the prior pay policy that Virginia State University utilized does not

[33] *Rizo*, 950 F.3d. at 1225.

[34] 29 U.S.C. § 206(d)(iv).

[35] *Rizo*, 950 F.3d at 1224 (noting that "Because the three enumerated exceptions are all job-related, and the elements of the "equal work" principle are job-related, Congress' use of the phrase "any *other* factor other than sex" [emphasis added] signals that the fourth exception is also limited to job-related factors).

[36] 919 F.3d 199, 206 (4th Cir, 2019).

fit under the fourth exception of the Equal Pay Act because prior pay is not a factor at all, but instead a proxy for other factors. It does not matter that the defendants in Spencer alleged that their prior pay method is informed by non-sex-based factors.[37] If the university wishes to truly establish an affirmative defense which proves that no-sex-based factor was involved, then it needs to establish the existence of those specific non-sex-based factors that are contained within the prior pay policy, not just prior pay itself. Those factors need to stand on their own merit. Thirdly, prior pay is not a job-related factor, and the legislative intent of the EPA requires that it be. Lastly, the text of the statute clearly indicates that the fourth exception needs to be read in relation to the three other exceptions, all of which are job-related as well, and so prior pay would not fit into that exception.

[37] *Spencer*, 919 F.3d at 205-206.

M E M O R A N D U M

May 28, 2021

From: Sami Ghanem

Re: Good Faith Jury Instruction - SDNY Charges

Names and personal information have been redacted.

Ms. Jane Smith is a resident of the United States. Ms. Smith and her husband were charged in the District Court of the Southern District of New York with creating fraudulent representations in visa applications for domestic workers to come to the United States and be in their service. Ms. Jane Smith was charged with violating 18 U.S.C. § 1001 and § 1546(a). Ms. Smith maintains that she had no knowledge or involvement in the creation and fraudulent representation on these visa applications. She maintains that her husband always managed the financial and family affairs of their household, and that she had no reason otherwise to question the applications completed by her husband. This memo provides an overview of the legal principles that must guide a good faith jury instruction in the Second Circuit. It proposes a jury instruction in line with these principles. Finally, it addresses the Second Circuit's principle of allowing courts the discretion whether explain good faith jury defenses, before then discussing how the defense could motivate the court to do so for Ms. Smith's case.

I. Overview

18 U.S.C. § 1001 criminalizes the act of making false statements to a federal government official. An act falls within the statute if an actor "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States knowingly and willfully:"

> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

The *mens rea* of the crime involves "knowingly and willfully" committing the crime, and the Second Circuit has already affirmed that "conduct [is] not 'willful' if it was due to negligence, inadvertence, or mistake or was the result of a good faith misunderstanding." *United States v. McGinn*, 787 F.3d 116, 126 (2d Cir. 2015). As the evidence indicates, Smith "lacked any specific knowledge or intent with regard to the visa process." *DP Letter*, pg 2. A good faith defense, if accepted, completely defeats the charge levied against the defendant by negating the necessary willfulness element. Therefore, any instruction that includes this defense must also instruct that

the "theory if believed [justifies] acquittal on those charges." *United States v. Regan*, 937 F.2d 823, 826-827 (2d Cir. 1991).

18 U.S.C. § 1546(a) criminalizes the fraudulent use or the falsification of information on visas/visa applications. The statute penalizes "whoever *knowingly* makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, *knowingly* subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or *knowingly* presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact…" [emphasis added].

A successful good faith defense also negates any charges of knowledge of falsity.[1] As a result, a good faith jury instruction would need to acknowledge this. See *Regan*, 937 F.2d at 826-827. Lastly, the court has the discretion to decide whether to explain the meaning of good faith in the instruction. The combination of precedent and the circumstances of our case lend some strength to our argument that specific language explaining good faith should be included the court's jury instruction.

II. Legal Framework

A. Good Faith Jury Instruction Principles Required by the Second Circuit

For a good faith jury instruction to be approved by the court in the Second Circuit, it must fulfill certain principles that prevent the jury from being misled about the meaning of the instruction and that ensure the instruction is truly based in the evidence.

First, a defense in the good faith instruction is admissible only if this defense is founded in the evidence itself. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). Therefore, this memorandum notes that the good faith defense within the instruction must be founded in the evidence of Smith's relationship with her husband and her lack of knowledge surrounding the financial and immigration affairs of her family.

Second, a good faith instruction should not be restricted by language applying an objective reasonable test to the defendant's good faith belief. The question is not whether the defendant's beliefs are objectively reasonable; the question is whether the defendant held those beliefs and that those beliefs amounted to a good faith misunderstanding or lack of knowledge of the criminal conduct in question, thus eliminating the knowledge or willfulness element of the crime. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991).

Third, the defendant is entitled to have the court clearly instruct the jury that if the good faith defense is believed, the defense justifies acquittal on those charges. The Second Circuit

[1] The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. 1 MODERN FEDERAL JURY INSTRUCTIONS - CRIMINAL PROCEDURE 8.01 (2020).

provided as much in *Regan*: "a generalized charge on good faith was insufficient to instruct the jury concerning appellants' specific good faith defense… appellants were entitled to have the trial court clearly instruct the jury, relative to appellants' theory of defense to the tax charges, that the theory if believed justified acquittal on those charges." 937 F.2d at 826-827 (1991).

Fourth, if the jury instruction is worded in a way as to mislead the jury about the correct legal standard to be applied in the case, or if it does not correctly inform the jury of the law, then it is erroneous and can be set aside by the court. *See Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997); *Manley v. AmBase Corp.*, 121 F. Supp. 2d 758, 766 (S.D.N.Y. 2000). This principle can play an important role in considerations of the necessity of language explaining "good faith" for our proposed jury instruction.

Fifth, instructions about "no ultimate harm" could confuse the jury into believing that the prosecution does not have to prove the existence of intent to harm, so the jury would not properly consider the acquittal potential of a good faith defense. These types of misleading instructions were rejected by the Second Circuit in *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998). The rejected instructions stated that "no amount of honest belief on the part of the defendant that the scheme would not ultimately result in a financial loss to the New York City Fire Department or its Pension Fund will excuse fraudulent actions or false representations by him to obtain money." *Id.* Though this is not the same as saying there is no good faith defense, this language has the potential to confuse the jury into believing there actually is no good faith defense. The Second Circuit acknowledged this, concluding "there is a substantial risk that the jury could have been confused into believing that the government was not required to prove that Rossomando intended to harm the Pension Fund…" *Id.* at 202. The Second Circuit did limit this ruling later on by allowing a "no ultimate harm" jury instruction to remain in *Chong Shing Wu v. United States*, because "the instruction is predicated on a distinction between immediate and ultimate harm that was simply nonexistent under the unique facts of *Rossomando*." *Chong Shing Wu v. United States*, 2014 U.S. Dist. LEXIS 69133, 36.

B. Discretionary Principle on Explanations of Good Faith in Good Faith Instructions in the Second Circuit

In the Second Circuit, courts have the discretion to decide if they want to explain good faith defenses in a good faith instruction. There is a circuit split on the issue. In 1985, the Supreme Court denied certiorari to a case that would have resolved the issue, but Justice White advocated for resolving it in a dissent.

> The United States Court of Appeals for the Ninth Circuit held that if a specific intent instruction adequately covers the issue of good faith, that is sufficient to present the defense to the jury, and the defendant is not entitled to a separate good faith instruction. 745 F. 2d 1205 (1984). Three other Courts of Appeals have reached the same conclusion. United States v. Gambler, 213 U.S. App. D.C. 278, 281, 662 F. 2d 834, 837 (1981); United States v. Bronston, 658 F. 2d 920, 930 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Sherer, 653 F. 2d

> 334, 337-338 (CA8), cert. denied, 454 U.S. 1034 (1981). Both the Fifth Circuit in United States v. Fowler, 735 F. 2d 823, 828 (1984), and the Tenth Circuit in United States v. Hopkins, 744 F. 2d 716, 718 (1984) (en banc), however, have reached the opposite conclusion. Both of these courts have held that when the defendant presents evidentiary support for his good faith defense, the trial court must give a separate instruction to the jury on this issue… Given this square conflict among the Courts of Appeals, I would grant certiorari in this case. *Green v. United States*, 1985 U.S. LEXIS 4156, *1-2, 474 U.S. 925, 106 S. Ct. 259, 88 L. Ed. 2d 266, 54 U.S.L.W. 3268.

White noted the Second Circuit's position that a specific-intent instruction is sufficient to cover a good faith defense. The Second Circuit has reaffirmed this position in multiple cases, leaving no room for doubt about the discretion of the court to specifically explain what a good faith defense is. If willfulness is an element of the crime, as it is in the 18 U.S.C. § 1001 charge against Smith, then "a jury instruction on willfulness in criminal tax cases need not describe the contours of the good faith defense in exhaustive detail. Indeed, such an instruction need not reference the good faith defense at all… By explaining that a good faith misunderstanding negates willfulness, an essential element of the offense, the jury instructions here left no room for doubt that a finding of a good faith misunderstanding on the part of D'Agostino would preclude conviction. The district court's jury instructions were thus wholly proper." *United States v. D'Agostino*, 638 Fed. Appx. 51, 54, 2016 U.S. App. LEXIS 463, *5-6, 2016-1 U.S. Tax Cas. (CCH) P50,144, 117 A.F.T.R.2d (RIA) 2016-429.

In the Second Circuit, the most fact-specific similar case to the one at hand appears in *United States v. Al Morshed*, where the court affirmed that non-necessity of including a separate explanation of the good faith defense: "this court has long adhered to the view held by a majority of the circuits that a district court is not required to give a separate good faith defense instruction provided it properly instructs the jury on the government's burden to prove the elements of knowledge and intent, because, in so doing, it necessarily captures the essence of a good faith defense… To the extent a minority of the circuits take a different view, see *United States v. Casperson*, 773 F.2d 216, 223-24 (8th Cir. 1985) (requiring good faith defense charge when specifically requested and factually warranted); *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc)." *United States v. Al Morshed*, 69 Fed. Appx. 13, 16, 2003 U.S. App. LEXIS 12930, *6-7. The case also involved a misrepresentation of immigration documents (a fraudulent INS I-94 form and an R-1 visa). These decisions make it near impossible to propose that the district court in our case is required to include language precisely explaining the good faith defense.

III. Creation and Analysis of the Proposed Good Faith Jury Instruction

A. The Language of the Proposed Instruction Is As Follows

Our ideal proposed jury instruction is as follows: "If Ms. Smith believed in good faith that the immigration forms were being handled in compliance with the law by other parties, even

if she was mistaken in that belief, and even if others were injured by the conduct, there would be no crime. The good faith defense established in this case completely defeats the charges levied against the defendant. The burden of establishing lack of good faith and criminal intent entirely rests on the government. Ms. Smith is under no burden to prove her good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. Good faith means that the defendant had 'good intentions and the honest exercise of judgment,' and thus did not knowingly or willfully lie to a federal government official under § 1001, or knowingly commit immigration fraud under § 1546(a)."

B. The Proposed Instruction Comports with the Principles of the Second Circuit

The language provided in the instruction comports with the required principles that the Second Circuit and the Supreme Court have applied to good faith jury instructions.

The instruction is based on evidence which indicates that Ms. Smith had no knowledge or willfulness in the commission of the charges. This comports with the principle that the defense in the good faith instruction is admissible only if this defense is founded in the evidence itself. *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005). Ms. Smith moved into a household which was "already staffed by domestic workers… all of whom had been vetted… she plainly had no desire or ability to interfere in the process that had been established by her husband." *DP Letter*, pg 13. Furthermore, "with respect to immigration status, Ms. Smith had no role." *Id.* This is sufficient foundation for a good faith defense, and therefore, it warrants inclusion within the instruction.

The instruction does not include any language suggesting that there is an objective test to evaluate Smith's good faith belief. The phrase "if Ms. Smith believed" indicates that the defendant's own belief is the only important part; the question is whether the defendant held those beliefs and that those beliefs amounted to a good faith misunderstanding or lack of knowledge of the criminal conduct in question, thus eliminating the knowledge or willfulness element of the crime. *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991). Because no such language exists discussing whether it is reasonable for the defendant to have had this belief, the jury instruction fulfills this principle.

The instruction must and does include language to express the defendant's entitlement to instruct the jury that if the good faith is to be believed, then the charge is defeated. This occurs in our case, because the essential *mens rea* of the crime includes knowledge (18 U.S.C. § 1546(a) and § 1001) and willfulness (§ 1001), and if this element is defeated, the charge is defeated. Therefore, this entitlement is expressed in the beginning of the jury instruction: "If Ms. Smith believed in good faith that the immigration forms were being handled in compliance with the law by other parties, even if she was mistaken in that belief, and even if others were injured by the conduct, there would be no crime. The good faith defense established in this case completely defeats the charges levied against the defendant."

C. The Court Should Elect To Include Language Explaining the Good Faith Defense In Our Instruction

Although the Second Circuit does not require that the district court elect to include language explaining what a good faith defense is or even the words "good faith," we should persuade this court to utilize the good faith defense to ensure that the jury fully understands the defense being used and understands the law. It is true that the Second Circuit maintains that "such an instruction need not reference the good faith defense at all… By explaining that a good faith misunderstanding negates willfulness, an essential element of the offense, the jury instructions here left no room for doubt that a finding of a good faith misunderstanding on the part of D'Agostino would preclude conviction." *United States v. D'Agostino*, 638 Fed. Appx. 51, 54, 2016 U.S. App. LEXIS 463, *5-6, 2016-1 U.S. Tax Cas. (CCH) P50,144, 117 A.F.T.R.2d (RIA) 2016-429. However, the risk for error in this case is too great owing to the circumstances, and the court should note times where it chose to exercise discretion to explain the good faith defense. Therefore, the language explaining the good faith defense in our instruction should be included: "The good faith defense established in this case completely defeats the charges levied against the defendant. The burden of establishing lack of good faith and criminal intent rests on the government. A defendant is under no burden to prove his good faith; rather, the government must prove bad faith or knowledge of falsity beyond a reasonable doubt. Good faith means that the defendant had 'good intentions and the honest exercise of judgment,' and thus did not knowingly or willfully lie to a federal government official under § 1001, or knowingly commit immigration fraud under § 1546(a)."

Firstly, past instances of exercised discretion to explain the good faith defense could motivate the court to exercise that discretion here. In this district court itself (SDNY), upon request by the jury, the court provided "clarification of the terms 'preponderance of the evidence' and 'good faith.' When the jury was asked its verdict as to Velez, it announced that it had found Mayer liable for $75,000 in compensatory damages. The jury was then recharged on the requested legal definitions." *Greene v. New York*, 675 F. Supp. 110, 119, 1987 U.S. Dist. LEXIS 11510, *25 This past example indicates that the jury has encountered confusion in understanding good faith and a good faith defense, and that danger is present in this case. Furthermore, other district courts have taken the initiative to provide specific explanations of the good faith defense. In *United States v. Maye*, the court "specifically instructed the jury concerning Maye's good faith defense. As set out above, the good faith instruction defined the parameters of the good faith defense and specifically instructed the jury that good faith included "good intentions and the honest exercise of best professional judgment" and actions taken "in accordance with what [Maye] reasonably believed to be the standard of medical practice generally recognized." *United States v. Maye*, 2014 U.S. Dist. LEXIS 48480, *10, 2014 WL 1377225. Additionally, in *United States v. Funaro* 2004 U.S. Dist. LEXIS 10413, *18-19, 222 F.R.D. 41, 47, the court "also explained the "good faith" defense [Jury Instruction 19]." These past instances demonstrate that when needed, Second Circuit district courts can and have gone out of their way to explain good faith defenses, as is needed in the present case with Smith's defense.

The need for a good faith instruction is embedded in the requirement by the Second Circuit for the jury charge to adequately inform the jury as to the proper legal standard or to the law. Otherwise, "a jury's verdict will be set aside based on an erroneous jury charge if the moving party can show that the error was prejudicial in light of the charge as a whole. See *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 153 (2d Cir. 1997)." *Manley v. AmBase Corp.*, 121 F. Supp. 2d 758, 766, 2000 U.S. Dist. LEXIS 17312, *18-19. Some factors indicate a greater danger for the risk of a misled jury without the specific explanation of good faith. First, this case is one where the good faith defense applies to two charges, one requiring the elements of knowledge and willfulness (§ 1001) and the other with knowledge (§ 1546(a)). The jury may be confused by the differing requirements between the two charges. Additionally, there is also a danger that the jury, unfamiliar with subjective and objective tests, may think it needs to objectively evaluate whether they feel that the defendant's good faith belief was reasonable to them, which is incorrect. *See Pabisz,* 936 F.2d at 83. An explanation, as the one in *Greene*, will prevent that danger.

Unfortunately, there are great limitations to the argument for adding specific language regarding good faith defense. First, the cases in which district courts in the Second Circuit have taken the initiative to include specific good faith language are not very similar on the facts to the case before us. These cases involve medical malpractice lawsuits in which the medical practitioner being sued was using his best good faith professional judgement to make decisions. *United States v. Maye*, 2014 U.S. Dist. LEXIS 48480, *10, 2014 WL 1377225; *United States v. Funaro*, 2004 U.S. Dist. LEXIS 10413, *18-19, 222 F.R.D. 41, 47. On the other hand, the most similar case on the facts in the Second Circuit again affirmed that non-necessity of including a separate explanation of the good faith defense: "this court has long adhered to the view… that a district court is not required to give a separate "good faith defense instruction provided it properly instructs the jury on the government's burden to prove the elements of knowledge and intent, because, in so doing, it necessarily captures the essence of a good faith defense." *United States v. Al Morshed*, 69 Fed. Appx. 13, 16, 2003 U.S. App. LEXIS 12930, *6-7.

The Second Circuit has taken many opportunities to emphasize the non-necessity of including specific language about good faith defenses, while rarely indicating instances where it would be a good idea to include that language. This presents a difficult challenge. That challenge will need to be overcome by indicating unique circumstances in the present case, such as Smith's abusive relationship resulting in her complete lack of knowledge, the two separate *mens rea* requirements from the two charges, and the importance of the good faith defense to the case. It will then need to be overcome by demonstrating how those circumstances warrant an instruction that includes language specifying what good faith is.

Applicant Details

First Name	**Sami**
Last Name	**Ghanem**
Citizenship Status	**U. S. Citizen**
Email Address	**sg3wu@virginia.edu**
Address	**Address** Street **525 Seymour Road, Apt 1** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**8054180755**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**March 2019**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Journal of Social Policy and the Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Lile Intramural Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Organization**

Recommenders

Frampton, Thomas
tframpton@law.virginia.edu
(434) 924-4663

Hodges, Ann
ahodges@law.virginia.edu
804-339-9440

Rutherglen, George
grutherglen@law.virginia.edu
(434) 924-7015

References

Professor George Rutherglen: grutherglen@law.virginia.edu, home phone number is 434-977-0687, office phone number is 434-924-7015,
Professor Ann Hodges: 804-339-9440, ahodges@law.virginia.edu
Professor Thomas Frampton: 202-352-8341, tframpton@law.virginia.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sami Ghanem

525 Seymour Road, Apt 1, Charlottesville, VA 22903
(805) 418-0755 • sg3wu@virginia.edu

June 14, 2021

The Honorable Elizabeth W. Hanes
U.S. District Court, Eastern District of Virginia
401 Courthouse Square
Alexandria, VA 22314

Dear Judge Hanes:

I am a rising third-year law student at the University of Virginia School of Law and I am interested in a position in your chambers as a law clerk for the 2022-2024 term.

Enclosed within my application is my resume, my law school transcript and my undergraduate transcript. I have also enclosed my writing sample of a case comment on *Spencer v. Virginia State University*, prepared during my independent study class with Professor George Rutherglen. Professor George Rutherglen, Professor Ann Hodges, and Professor Thomas Frampton have agreed to submit letters of recommendation on my behalf to your chambers. They have also gladly agreed to directly speak to you regarding my application. Professor Rutherglen's home phone number is 434-977-0687 and his office phone number is 434-924-7015; Professor Hodges' phone number is 804-339-9440; Professor Frampton's phone number is 202-352-8341.

Thank you for your consideration of my application.

Sincerely,

Sami Ghanem

Sami Ghanem

525 Seymour Road, Charlottesville, VA 22903 • (805) 418-0755 • sg3wu@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2022

- *Virginia Journal of Social Policy and the Law*, Editorial Board Member
- Muslim Law Student Association, President, Treasurer, Member-at-large
- Middle Eastern and North African Association, Treasurer
- National Lawyers Guild, Treasurer
- American Constitutional Society, Membership Development Chair
- Lile Intramural Moot Court Competitor
- UVA Innocence Project Pro Bono
- Virginia Law Ambassador

University of California, Santa Barbara, Goleta, CA
B.A., Political Science, with Honors, June 2019

EXPERIENCE

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City, NY
Summer Law Clerk, May – August 2021

Professor George Rutherglen, University of Virginia School of Law, Charlottesville, VA
Research Assistant, May – August 2020

- Researched and analyzed employment law developments, revised textbook for pending publication

Ventura County Public Defenders' Office, Ventura, CA
Winter Pro Bono Legal Intern, January 2020

- Drafted procedural motions, oral arguments, and memoranda for cases regarding assigned public defender's clients
- Conducted legal research on behalf of clients and attended hearings and trials

Office of Congresswoman Julia Brownley, Thousand Oaks, CA
Congressional Intern, January – April 2019

- Communicated daily with constituents and agencies via telephone and email to resolve Social Security, Veterans' Affairs, or immigration-related issues
- Coordinated logistics for district-based projects, such as county art competitions

University of California, Santa Barbara, Goleta, CA
Research Assistant for Professor Laurie Freeman, January – March 2019

- Researched data for books on nuclear waste disposal and a history of yellow journalism

Research Assistant for Professor Hahrie Han, January – June 2018

- Created and organized database for thousands of field observations on U.S. interest groups

Model United Nations at UC Santa Barbara, Goleta, CA
Director-General, August 2016 – June 2018

- Managed UCSB-hosted college and high-school conferences, trained committee chairs
- Represented UCSB in collegiate Model UN in national competitions

INTERESTS

Table tennis, soccer (Liverpool FC supporter), chess, biking, hiking, Helping Hands donation drives, foosball, reading, exploring libraries, fishing

Sami Ghanem

06/13/2021

Beginning of Law Record

2019 Fall

School: School of Law
Major: Law

LAW	6000	Civil Procedure	B+	4.0
LAW	6002	Contracts	B+	4.0
LAW	6003	Criminal Law	B+	3.0
LAW	6004	Legal Research and Writing I	S	1.0
LAW	6007	Torts	B	4.0

2020 Spring

School: School of Law
Major: Law

LAW	6001	Constitutional Law	CR	4.0
LAW	6005	Lgl Research & Writing II (YR)	S	2.0
LAW	6006	Property	CR	4.0
LAW	7098	Public Interest Law & Advocacy	CR	2.0
LAW	9252	Poverty in Law/Lit/Culture	CR	3.0

2020 Fall

School: School of Law
Major: Law

LAW	6102	Administrative Law	B	4.0
LAW	7022	Employment Discrimination	B+	3.0
LAW	7059	Labor Law	B+	3.0
LAW	7067	National Security Law	B+	3.0
LAW	8813	Independent Research	A-	3.0

2021 Spring

School: School of Law
Major: Law

LAW	6104	Evidence	B+	4.0
LAW	7123	Class Actions/Aggregate Litgtn	B+	3.0
LAW	8811	Independent Research	A	1.0
LAW	9088	Sup Court Justices & Judging	B+	3.0
LAW	9240	Con Law II: Poverty	B+	3.0

End of Law School Record

UCSB Gaucho On-Line Data

UNOFFICIAL TRANSCRIPT

Welcome SAMI GHANEM

Print with Legal Name

Print with Name

University of California, Santa Barbara

1/2/2020 6:50:18 PM

Unofficial Transcript

SAMI GHANEM
Perm Number: 8182164

College/ Objective/ Major/ Emphasis	Degree Status	Conferral Date
L&S/ BA/ POLS	Awarded	3/22/2019

Fall 2014

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
GEOG 5 -PEOPLE/PLACE/ENVIRO		C	24281	4.0	4.0	4.0	8.00	
HIST 2A -WORLD HISTORY		B-	25825	4.0	4.0	4.0	10.80	
MATH 34A -CALC FOR SOCIAL SCI		B	31476	4.0	4.0	4.0	12.00	
Quarter Total (Undergrad)	**GPA**	**2.56**		12.0	12.0	12.0	30.80	
Cumulative Total (Undergrad)	**GPA**	**2.56**		12.0	12.0	12.0	30.80	

Winter 2015

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
MATH 34B -CALC-SOC & LIFE SCI		NP	32391	4.0	0.0	0.0	0.00	Repeated
WRIT 2 -ACADEMIC WRITING		B+	50070	4.0	4.0	4.0	13.20	
Quarter Total (Undergrad)	**GPA**	**3.30**		8.0	4.0	4.0	13.20	
Cumulative Total (Undergrad)	**GPA**	**2.75**		20.0	16.0	16.0	44.00	

Spring 2015

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
MATH 34B -CALC-SOC & LIFE SCI		C-	29710	4.0	4.0	4.0	6.80	Repeat
MUS 17 -WORLD MUSIC		D-	33381	4.0	4.0	4.0	2.80	Repeated
PSTAT 5A -STATISTICS		F	71753	5.0	0.0	5.0	0.00	Repeated
Quarter Total (Undergrad)	**GPA**	**0.73**		13.0	8.0	13.0	9.60	
Cumulative Total (Undergrad)	**GPA**	**1.84**		33.0	24.0	29.0	53.60	
On Probation								

Fall 2015

14 Messages Feedback Help Logout

PSTAT 5A -STATISTICS		**W**	41715	5.0	0.0	0.0	0.00
Quarter Total (Undergrad)	**GPA**	**0.00**		0.0	0.0	0.0	0.00
Cumulative Total (Undergrad)	**GPA**	**1.84**		33.0	24.0	29.0	53.60
On Probation							

Summer 2016

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
CH ST 138 -BARRIO POPULAR CULT		**A**	17384	4.0	4.0	4.0	16.00	
ENGL 10 -INTRO TO LIT STUDY		**A**	05942	4.0	4.0	4.0	16.00	
HIST 17C -AMERICAN PEOPLE		**A**	08144	4.0	4.0	4.0	16.00	
HIST 4B -WESTERN CIVILIZATIO		**A-**	16600	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.92**		16.0	16.0	16.0	62.80	
Cumulative Total (Undergrad)	**GPA**	**2.58**		49.0	40.0	45.0	116.40	
On Probation								

Fall 2016

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
C LIT 33 -AFRICAN LITERATURES		**A-**	53728	4.0	4.0	4.0	14.80	
EARTH 20 -GEOL CATASTROPHES		**A-**	11577	4.0	4.0	4.0	14.80	
ENGL 15 -SHAKESPEARE		**B+**	17277	4.0	4.0	4.0	13.20	
Quarter Total (Undergrad)	**GPA**	**3.56**		12.0	12.0	12.0	42.80	
Cumulative Total (Undergrad)	**GPA**	**2.79**		61.0	52.0	57.0	159.20	

Winter 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
ECON 1 -PRINCIPL ECON MICRO		**P**	13847	4.0	4.0	0.0	0.00	
POL S 12 -AMER GOV & POLITICS		**A-**	41723	4.0	4.0	4.0	14.80	
WRIT 105PD-WRIT PUB DISCOURSE		**A-**	49197	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.70**		12.0	12.0	8.0	29.60	
Cumulative Total (Undergrad)	**GPA**	**2.90**		73.0	64.0	65.0	188.80	

Spring 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
CLASS 150 -FALL ANC REPUBLIC		**A-**	51466	4.0	4.0	4.0	14.80	
ECON 9 -INTRO TO ECONOMICS		**B**	12633	4.0	2.0	2.0	6.00	
INT 101 -LEGAL CAREER & LAW		**P**	26377	1.0	1.0	0.0	0.00	
MUS 17 -WORLD MUSIC		**A**	33985	4.0	0.0	4.0	16.00	Repeat
POL S 6 -INTRO COMP POLITICS		**A-**	38521	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.68**		17.0	11.0	14.0	51.60	
Repeat Adjustment						-4.0	-2.80	
Cumulative Total (Undergrad)	**GPA**	**3.16**		90.0	75.0	75.0	237.60	

Summer 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 7 -INTRO TO IR		**A**	11981	4.0	4.0	4.0	16.00	
POL S 1 -INTRO TO POL PHIL		**A-**	11908	4.0	4.0	4.0	14.80	
PSTAT 5A -STATISTICS		**A**	12419	5.0	5.0	5.0	20.00	Repeat
Quarter Total (Undergrad)	**GPA**	**3.90**		13.0	13.0	13.0	50.80	

Fall 2017

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
COMM 88 -COMM RESEARCH METH		A-	49205	5.0	5.0	5.0	18.50	
ENV S 177 -COMP ENVIRON POL		A	56226	4.0	4.0	4.0	16.00	
ES 1- 43A -BEGIN WEIGHT TRAIN		P	20214	0.5	0.5	0.0	0.00	
POL S 153 -POL INTEREST GROUPS		B+	54833	4.0	4.0	4.0	13.20	
POL S 121 -INTERNATL POLITICS		A-	54668	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.67**		17.5	17.5	17.0	62.50	
Cumulative Total (Undergrad)	**GPA**	**3.50**		120.5	105.5	100.0	350.90	

Winter 2018

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 161 -US MINORITY POL		A-	56853	4.0	4.0	4.0	14.80	
POL S 119JW-ETHICAL ISSUES IR		A	56697	4.0	4.0	4.0	16.00	
POL S 186 -INTRO INTL POL ECON		A-	57083	4.0	4.0	4.0	14.80	
POL S 135 -GOV'T/POL OF JAPAN		A-	42143	4.0	4.0	4.0	14.80	
Quarter Total (Undergrad)	**GPA**	**3.77**		16.0	16.0	16.0	60.40	
Cumulative Total (Undergrad)	**GPA**	**3.54**		136.5	121.5	116.0	411.30	
Dean's Honors (L&S)								

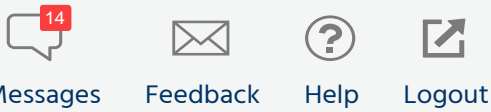
Spring 2018

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POL S 126 -INTERNATIO SECURITY		A	55798	4.0	4.0	4.0	16.00	
POL S 106MO-SPECIAL TOPICS		A-	55723	4.0	4.0	4.0	14.80	
POL S 196 -SR SEMINAR POL SCI		A+	55772	4.0	4.0	4.0	16.00	
POL S 147 -DEVELOP COUNTRY POL		P	40634	4.0	4.0	0.0	0.00	
Quarter Total (Undergrad)	**GPA**	**3.90**		16.0	16.0	12.0	46.80	
Cumulative Total (Undergrad)	**GPA**	**3.57**		152.5	137.5	128.0	458.10	
Dean's Honors (L&S)								

Winter 2019

Course		Grade	EnrlCd	Att Unit	Comp Unit	GPA Unit	Points	Additional Info
POLS XSB199RA-Indep Research Asst		A+		3.0	3.0	3.0	12.00	
Quarter Total (Undergrad)	**GPA**	**4.00**		3.0	3.0	3.0	12.00	
Cumulative Total (Undergrad)	**GPA**	**3.58**		155.5	140.5	131.0	470.10	

Transfer Work Undergraduate Total: 39.5
UC & Transfer Work Undergraduate Total: 180.0


14
Messages
Feedback
Help
Logout

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am happy to write on behalf of Sami Ghanem, who I understand is applying for a clerkship in your chambers. I don't know Sami as well as I know many of the students for whom I write letters, but I did supervise an independent writing assignment he completed last semester, and we had a few lengthy conversations, both about the paper and life, during that process. Sami is outgoing, highly motivated, polite (almost to a fault), and I think he would make a fine judicial law clerk.

Sami's writing project was a Case Comment on the issue of venue for failure-to-register prosecutions under the Sex Offender Registration and Notification Act (SORNA). He wrote in defense of the Seventh Circuit's approach, United States v. Haslage, 853 F.3d 331 (7th Cir. 2017) (holding venue does not lie in the district from which offender departs), which thus far stands in conflict with every other appellate court to consider the question. He adopts a historical approach, underscoring the importance of the vicinage requirement at common law, and then argues that the Seventh Circuit's idiosyncratic approach is more faithful to this context and the statute's plain text than the alternative. His draft (at least as presently written) breaks little new ground, but it demonstrates an ability to clearly explain the split and marshal a compelling argument in favor of his preferred position.

Sami is highly self-motivated and extremely outgoing; you get the sense that he would be comfortable in whatever environment he might be thrown. (This is, I think, a product of his upbringing: he lived in six different states growing up.) He is currently planning on working for a firm after law school, but he also cares deeply about using the law to address social and political inequality—particularly discrimination against Arab-Americans and Muslim-Americans. Eventually, he hopes to do plaintiff-side work involving employment law, class actions, consumer protection, and environmental law.

If you have any questions or if there is any additional information I can provide, please do not hesitate to contact me via phone (202-352-8341) or email (tframpton@law.virginia.edu).

Sincerely,

Thomas Frampton

April 04, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Applicant Sami Ghanem

Dear Judge Hanes:

This is a letter of recommendation for Sami Ghanem, who is applying to be a clerk in your chambers. On the basis of Mr. Ghanem's performance in my Labor Law class and my subsequent work with him on his paper on the Equal Pay Act, I strongly recommend him for the clerkship.

I first met Mr. Ghanem as a student in my Fall 2020 Labor Law class. The fall semester was challenging due to the pandemic, resulting in a hybrid class that combined in-person and online students. Mr. Ghanem was one of the students who attended in-person. He quickly proved himself a thoughtful, well-prepared, and enthusiastic participant in class discussion. He was one of a small number of students who made a particularly noteworthy contribution to the discussion in at least one class. He performed well on the exam and short paper also, resulting in a grade of B+ in a very strong class, with a mandated curve and many 3L students.

After the class, Mr. Ghanem reached out to me to review his article on the Equal Pay Act. The article focused specifically on a Fourth Circuit decision addressing the question of whether salary history is a factor other than sex under the statute. The topic Mr. Ghanem chose is the subject of a significant circuit split and one of substantial current importance in the field of gender discrimination. He had a creative introduction to the paper based on his connection to the University of Virginia and its gender-based pay differential among the faculty. The first draft that I read was a very solid piece of legal analysis. Since that time, he has continued to work very hard on the paper, honing his analysis and revising and polishing his writing, resulting in an even better product.

One of Mr. Ghanem's strengths is his desire to continue learn and improve in every respect. He is that rare student who sought detailed feedback on his exam performance. His request that I review his paper on the Equal Pay Act similarly demonstrates that important quality of openness to continual learning and advice from others more experienced.

Mr. Ghanem's summer experiences have helped to prepare him to be successful in the clerkship. Last summer, he did research for Professor George Rutherglen, an expert in employment law. And during the current summer, he is working at the well-regarded law firm of Fried, Frank, Harris, Shriver & Jacobson. His analytical and communications skills will develop further as a result of his work at the law firm.

Mr. Ghanem has been an outstanding citizen of the law school, participating in multiple extracurricular activities. He has been a leader in both the Muslim Law Students Association and the Middle Eastern and North African Association, and served as an Editorial Board member of the Virginia Journal of Social Policy and the Law. He has enhanced his education through involvement in Moot Court and the Innocence Project. His enthusiasm for the law school is reflected in his role as a Virginia Law Ambassador. From my observation, he is respectful and considerate of faculty, staff and students at the law school.

In sum, Sami Ghanem has my strong recommendation for the clerkship with your chambers. In addition to his legal talents, he will be a delightful colleague who will work well with all in chambers. If you have any additional questions about Mr. Ghanem, please feel free to reach out to me at either 804-339-9440 or ahodges@law.virginia.edu.

Sincerely,

Ann C. Hodges
Visiting Professor of Law, University of Virginia
Professor of Law Emerita, University of Richmond

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing on behalf of Sami Ghanem, a rising third-year law student, who has applied for a clerkship with you. Sami received a B+ in my course in Civil Procedure and a B+ in Employment Discrimination. He also worked as my research assistant last summer. He is capable, inquisitive, and unfailingly courteous. I am happy to recommend him to you.

Both Civil Procedure and Employment Discrimination are demanding courses. They proceed both at the level of technical detail and of fundamental principles. In Civil Procedure, the Federal Rules and decisions interpreting them are intricate and controversial, and the whole course revolves around the meaning of due process. In Employment Discrimination, the burden of proof on a variety of issues is decisive in many cases, and the overall aim of the subject is to foster equality in employment. Sami did quite well in both courses, without getting lost in either the details or the abstractions but in seeing how they each affected each other. He is a very smart and diligent student.

These qualities came out strongly in his work for me as a research assistant. He assisted me in the last stages of publishing a book, where numerous loose ends all have to be tied up. He was exemplary in checking the citations in my manuscript and making sure they were up to date. He proofread the text and made many helpful suggestions. And he also took on the often tedious task of making an index. Without him, it would have been much more difficult to bring this book project to a successful conclusion.

Sami has been very active in the life of our law school, serving in numerous organizations, from the Virginia Journal of Law and Social Policy to the Innocence Project. All of these activities demonstrate his commitment to educating himself as a lawyer, outside as well as inside the classroom. He intends to have a career in litigation and he sees a clerkship as a valuable learning experience, where he can see first hand how cases are litigated and how decisions are made. Just as a clerkship would contribute to his career plans, he would contribute effectively to the work in any judge's chambers.

Sami has met the disruptions to legal education caused by the pandemic with poise and equanimity, adjusting well to the remote learning and social distancing that has dominated the law school experience this year. Based on this experience, I believe, he is well suited to meet the challenges of a clerkship, whatever they might be. He has the intellectual and personal qualities to be an excellent law clerk and I strongly recommend him to you.

Very truly yours,

George Rutherglen

John Barbee Minor Distinguished Professor of Law
Earle K. Shawe Professor of Employment Law
University of Virginia School of Law
580 Massie Road Charlottesville, VA 22903-1738
PHONE: 434.924.7015
FAX: 434.924.7536
grutherglen@law.virginia.edu • www.law.virginia.edu

Sami Ghanem: Writing Sample

Analysis Section from "Case Comment: The Future of Prior Pay After *Spencer v. Virginia State University*."

A. *Spencer's language regarding prior pay and the Equal Pay Act is dicta*

In the context of the overall opinion, the Fourth Circuit's language on prior pay in *Spencer v. Virginia State University* appears to be dicta. The opinion states "but even if Spencer could meet her initial burden, her claim would still fail because the University established that the salary difference was based on a 'factor other than sex.'"[1] The court took the time to first evaluate whether the plaintiff made a prima facie showing of a violation of the Equal Pay Act through the establishment of three elements.[2] After having found that Spencer's claim does not meet the second element of a prima facie claim, the court does not proceed to analysis of the third element,[3] evidently deeming it sufficient that the claim is defeated. Only after having already established that Spencer's claim has failed on the basis that she cannot establish the second element of the prima facie claim does the court as, almost as an afterthought, that "*but even* if Spencer could meet her initial burden, her claim would still fail" because of prior pay's status as a non-sex based factor (emphasis added). The section written on prior pay does not affect the overall holding, which is that Spencer's claim fails on the second element of a prima facie claim of a violation under the Equal Pay Act.[4]

[1] *Spencer*, 919 F.3d at 206.
[2] *Spencer*, 919 F.3d at 203.
[3] *Id.*
[4] *Spencer*, 919 F.3d at 203; Under Black's Law Dictionary, this section of the opinion meets the definition of obiter dictum. Obiter dictum is defined as "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." Black's Law Dictionary 1177 (9th ed. 2009).

Furthermore, the court provides no justification or reasoning to explain why prior pay is a non-sex-based factor, nor why it would fit under the fourth exception of the Equal Pay Act, making it all the more likely that the language of the court in *Spencer* on prior pay is just dicta. The Fourth Circuit notes that the employer has the burden of asserting an affirmative defense that another non-sex-based factor was the reason for the disparity. The university claimed that the factor was prior pay, and Spencer does not dispute that prior pay was a reason for the disparity. But the court only addresses the plaintiff's argument that the 9/12ths policy was applied inconsistently or erroneously, and therefore was simply a pretext, stating that "even if the University erroneously applied its 9/12ths practice to overpay Shackleford and Dial, such an imprudent decision would still serve as a non-sex-based explanation for the pay disparity."[5]

The court then quickly concludes that "permitting an employee to prevail on a wage discrimination claim with no evidence of intentional discrimination… requires that the work performed by the plaintiff and her comparators be equal and that the wage disparity not be based on a factor other than sex. Spencer's claim fails on both requirements."[6] The court never discusses why prior pay is a non-sex-based factor and does not cite any authority that does so.

The court ignores in the case proceedings instances where prior pay is alleged to be a sex-based factor. It does not respond to the plaintiff's argument in her opening brief, where she claims, "*any* policy of transitioning administrators to the faculty at 9/12 of their administrator salary would have a disparate impact on women because VSU's highest-paid administrators were overwhelmingly men" [emphasis added].[7] It ignores the defendant's argument that the Ninth

[5] *Id.*

[6] *Spencer*, 919 F.3d at 20

[7] Brief for Petitioner-Appellant at 49, Spencer v. Virginia State University, 2018 WL 1778726 (C.A.4).

Circuit recently held 'prior salary alone or in combination with other factors cannot justify a wage differential.'… the reasoning of *Rizo* would have no application here."[8]

The court in *Spencer* could have decided to make a decision without adopting the entire holding in *Rizo* on the issue of prior pay, electing to narrowly rule on the facts and circumstances of the case presented before them. The defendants clearly seem to have treated this case in this narrow manner, adding that "should the Court wish to consider *Rizo* further despite Spencer's waiver, Defendants would respectfully request leave to submit supplemental briefing."[9] The defendants are probably delighted with the final outcome of this case, because they did not even have to file a supplemental brief on *Rizo* or the subject of prior pay generally before the court wrote that prior pay did not constitute a sex-based-factor. This was made without citing or reiterating some reasoning from the defendant's brief or the plaintiff's brief, and without following some reasoning present in the circuit split on the issue. The decision to write the opinion in this manner leaves clear and obvious gaps that cannot be explained away, and it is the role of the court to make a properly complete and reasoned holding, rather than a mere aside paragraph on the issue of prior pay. The Fourth Circuit should more meaningfully revisit the issue and hold that prior pay is an impermissible factor on the basis of sex and does not fit under the scope of the fourth exception in the Equal Pay Act as a matter of law.

A review of past decisions does not indicate that the Fourth Circuit has taken a position on the issue of prior pay as a non-sex-based factor within the fourth exception of the Equal Pay Act. In *Brinkley v. Harbour Recreation Club*, the Fourth Circuit found that an employer may

[8] *Id*. at 49 fn. 9.

[9] Brief for the Respondent-Appellee, *supra* note 68.

review experience and salary history and use those factors to make compensation decisions. The court's precise language on this ruling is that the employer "reviewed a resume and salary history, assessed its financial situation, compared its situation with that of other similarly situated entities, and negotiated with [the comparator] to reach a mutually satisfying agreement as to an appropriate salary. The evidence indicates that [the employer] reached this agreement on the basis of [the comparator's] individual merits, not on the basis of his sex."[10] The court's language in *Brinkley* indicates that it found a combination of these factors sufficient to establish that the employer made a decision that was not based on sex in a way that would be impermissible under the Equal Pay Act. This decision is distinct from the decision in *Spencer*, because the Fourth Circuit in *Brinkley* does not make a specific holding as to whether prior pay alone could suffice to be a non-sex-based factor that would justify a compensation decision by an employer under the Equal Pay Act.

In conclusion, the nature of the language in *Spencer*, the complete lack of reasoning regarding the status of prior pay in the Equal Pay Act, and the lack of prior decisions ruling on prior pay individually indicate that the Fourth Circuit's language on prior pay in *Spencer* is dicta, rather than holding. District courts within the Fourth should feel empowered to make rulings that contravene this language, and it is not too late for the Fourth Circuit to reverse course with ease and without precedential barriers.

B. The reasoning of *Rizo* is applicable to *Spencer*, contrary to what the defendant claims

[10] 180 F.3d 598, 615 (4th Cir. 1999).

The defendant in *Spencer* claims that the reasoning of *Rizo v. Yovino* has no application to the case at hand.[11] The response brief makes note of several distinctions between *Spencer* and *Rizo*, stating *Spencer* involves prior pay from the same employer whereas *Rizo* involves prior pay from a different employer, so when "the same employer sets an employee's pay for a new position, it may reasonably consider the employee's length of service, experience, and so on, which would be reflected in the employee's prior pay with that employer."[12] Certainly, it is true that the same employer could reasonably consider these factors when deciding compensation, but if the old employer is the same as the new employer, this does not mean that the status of prior pay has somehow changed. The Ninth Circuit asks that "rather than use a second-rate surrogate that likely masks continuing inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is justified under the catchall exception."[13] Indeed, it is even easier for the same employer of past and present, like Virginia State University, to justify the current pay based on those other underlying factors besides prior pay, because that employer has had the opportunity to identify those non-sex-based factors during the course of that employee's tenure at the place of work. If the court allowed the employer to apply prior pay as a factor in instances where it would be even easier to specifically identify non-sex-based factors, the decision would be counterintuitive to the substance of the decision in *Rizo*, instead of finding an appropriate exception as defendants purport to claim in their brief.[14] Simply put, when the past employer is the same employer for the new position, claiming prior pay as a 'surrogate' would not

[11] Brief for the Respondent-Appellee, *supra* note 68.

[12] *Id.*

[13] *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018).

[14] Brief for the Respondent-Appellee, *supra* note 68.

acknowledge the true meaning of the decision in *Rizo*.[15] Finally, and perhaps most critically, when the Ninth Circuit reheard *Rizo* in 2020, it confirmed its position on the status of prior pay, as the concurrence by Judge McKeown noted: "The majority embraces a rule not adopted by any other circuit—prior salary may *never* be used, even in combination with other factors, as a defense under the Equal Pay Act" [emphasis added].[16]

To conclude, the fact that the past employer and the new employer are the same does not make prior pay permissible, nor does it mean that the reasoning of *Rizo* is inapplicable to the case of *Spencer*. Adopting the defendant's argument in *Spencer* would be counterintuitive, because it would be allowing an employer an exception from the normal affirmative defense burden just because the old employer is the same as the new one, despite the fact that the same employer should have an easier time identifying specific job-related non-sex-based factors that would justify the pay disparity.

C. Prior pay is a sex-based factor that does not belong to the fourth exception of the Equal Pay Act

Empirical evidence, textual analysis of the Equal Pay Act, and the legislative intent of the Equal Pay Act all suggest that prior pay is a sex-based factor which perpetuates past discrimination, and suggest that prior pay should not be placed in the fourth exception of the Equal Pay Act.

[15] This understanding is supported by Congress' intent in passing the Equal Pay Act as a "broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."*Rizo*, 887 F.3d at 460 (quoting *Corning*, 417 U.S. at 208). A broadly remedial understanding of the Equal Pay Act would not include counterintuitive exceptions.

[16] *Rizo*, 950 F.3d at 1232.

Firstly, evidence suggests that discrimination does play a significant role, but each decision by the Fourth, Seventh, and Eighth Circuit ignores this. As Weiler notes, "sex segregation obviously exists in the workplace… the claim that this factor has produced underpayment in female jobs is" supported by "pieces of circumstantial evidence… corroborated by some highly publicized examples of clear pay discrimination."[17] ." In conclusion, "it would seem reasonable to conclude that some significant portion of the gender wage gap is caused by the practice of underpaying work done primarily by women."[18] Prior pay perpetuates this portion of the gap, and therefore, regardless of whether factors within prior pay are mixed between sex-based and non-sex-based factors, overall prior pay is a sex-based factor, and is thus not permitted in compensation decisions under the Equal Pay Act. A practice which perpetuates past discrimination would run contrary to the purpose of the Act, which is in rectifying "the fact that the wage structure of 'many segments of American industry has been based on an ancient but outmoded belief that a man, because of this role in society, should be paid more than a woman even though his duties are the same.'"[19]

Next, asking the plaintiff to establish evidence to demonstrate that a particular past employer's pay structure is discriminatory is assuming that at its core, prior pay is by itself a non-sex-based factor, which is doing the work of the defendant. The only burden that the employer has is to assert that prior pay is what the employer used, not that the factors underlying prior pay are non-sex-based factors. To be clear, the Equal Pay Act does not "require employers to prove that the wages paid to their employees at prior jobs were unaffected by wage

[17] Weiler, *supra* note 39 at 1789-90.

[18] *Id.*

[19] *Corning*, 417 U.S. at 195 (quoting S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963)).

discrimination,"[20] but that they demonstrate there was an actual job-related non-sex-based factor which was responsible for the compensation decision in hiring.[21] The employer, in responding to a prima facie case alleging sex-based pay discrimination, has the burden of proving that "sex provide[d] no part of the basis for the wage differential."[22] That burden cannot be fulfilled by prior pay. Courts should not just assume that for the purposes of satisfying the affirmative defense, it is enough that "salary retention policies *may* serve legitimate, gender-neutral business purposes, such as the retention of skilled workers who may be needed in the future to perform higher level work"[23] [emphasis added]. Prior pay could, perhaps in individual circumstances, be a proxy for entirely non-sex-based job factors, which would align with the perspective that the Seventh Circuit has on the issue. But the reality is that "the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex."[24] Alleging that prior pay is a non-sex-based factor because it might possibly act as a proxy for non-sex-based factors is just as much of a non-sequitur as the court contends that the plaintiff's argument is.

A look into the legislative history of the Act indicates that the fourth exception was not designed to include all remaining possible exceptions that were not mentioned in the first three. Nevertheless, the Eighth Circuit contends that the Equal Pay Act "does not suggest any

[20] *Rizo*, 950 F.3d at 1228.

[21] The Fourth Circuit held that once a plaintiff has made the required prima facie showing under the Equal Pay Act, the employer is not entitled to summary judgment unless it proves a statutory affirmative defense so conclusively that no rational jury could reach a contrary conclusion. *U.S. Equal Employment Opportunity Comm'n v. Maryland Ins. Admin.*, 879 F.3d 114 (4th Cir. 2018).

[22] *Rizo*, 950 F.3d at 1228.

[23] *Taylor v. White*, 321 F.3d 710, 717–18 (8th Cir. 2003)

[24] *Rizo*, 950 F.3d at 1228.

limitations to the broad catch-all "factor other than sex" affirmative defense."[25] The court suggests that evidence such as legislative intent indicates prior pay should be placed into the fourth exception of the Equal Pay Act. The court finds that "the EPA does not suggest any limitations to the broad catch-all 'factor other than sex' affirmative defense… The legislative history supports a broad interpretation of the catch-all exception, listing examples of exceptions and expressly noting that the catch-all provision is necessary due to the impossibility of predicting and listing each and every exception."[26]

Certainly, Congress seems to have intended for the exception to be broad, but that does not mean that the exception is boundless and without limits. Otherwise, any possible factor could be alleged that would be a pretext for actual discrimination, and there would be no point for Congress of listing the three previous exceptions. The Eighth Circuit proclaims that a House Report indicates the exception was meant to be interpreted broadly and without limitation, yet in that very report, every single factor listed — "shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability"[27] — is a job-related factor. The history and the purpose of the Equal Pay Act suggest clear limitations on the fourth exception. For example, "Congress considered a survey of 1,900 employers that showed one in three used entirely separate pay scales for female employees who performed similar jobs to male employees."[28] As a result, it did

[25] *Id.*

[26] *Id.* (quoting House Comm. on Equal Pay Act of 1963, H.R.Rep. No. 309 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 689: "Three specific exceptions and one broad general exception are also listed… As it is impossible to list each and every exception, the broad general exclusion has also been included."). Note also that the court omits the first other from the fourth exception, which is "any other factor other than sex."

[27] *Taylor*, 321 F.3d at n.7.

[28] *Id.* at 1225.

not want to provide an exception that allowed for pretexts to be a way out. This is why the House listed only job-related factors in its example of factors which would fit under the fourth exception; allowing for any factor at all to be upheld as an affirmative defense would defeat the purpose of the Act.

The text of the Equal Pay Act also supports the job-related limitations on the fourth exception. The fourth exception is written as "any *other* factor other than sex," not just "any factor other than sex," which means that the exception needs to be read in relation to the three other exceptions, all of which are job-related as well. The adjective 'other' to modify the word factor implies that it is an 'other' besides the previous factors listed factors; this means that the fourth factor holds a relation to the previous three. Reading the fourth exception as limitless would mean that the first 'other' is "rendered meaningless, as would the three enumerated exceptions."[29]

[29] *Rizo*, 950 F.3d at 1224 (noting that "Because the three enumerated exceptions are all job-related, and the elements of the "equal work" principle are job-related, Congress' use of the phrase "any *other* factor other than sex" (emphasis added) signals that the fourth exception is also limited to job-related factors).